TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 176.

NG FUNG HO, OTHERWISE KNOWN AS UNG KIP; NG YUEN SHEW, GIN SANG GET, AND GIN SANG MO, PETITIONERS,

vs.

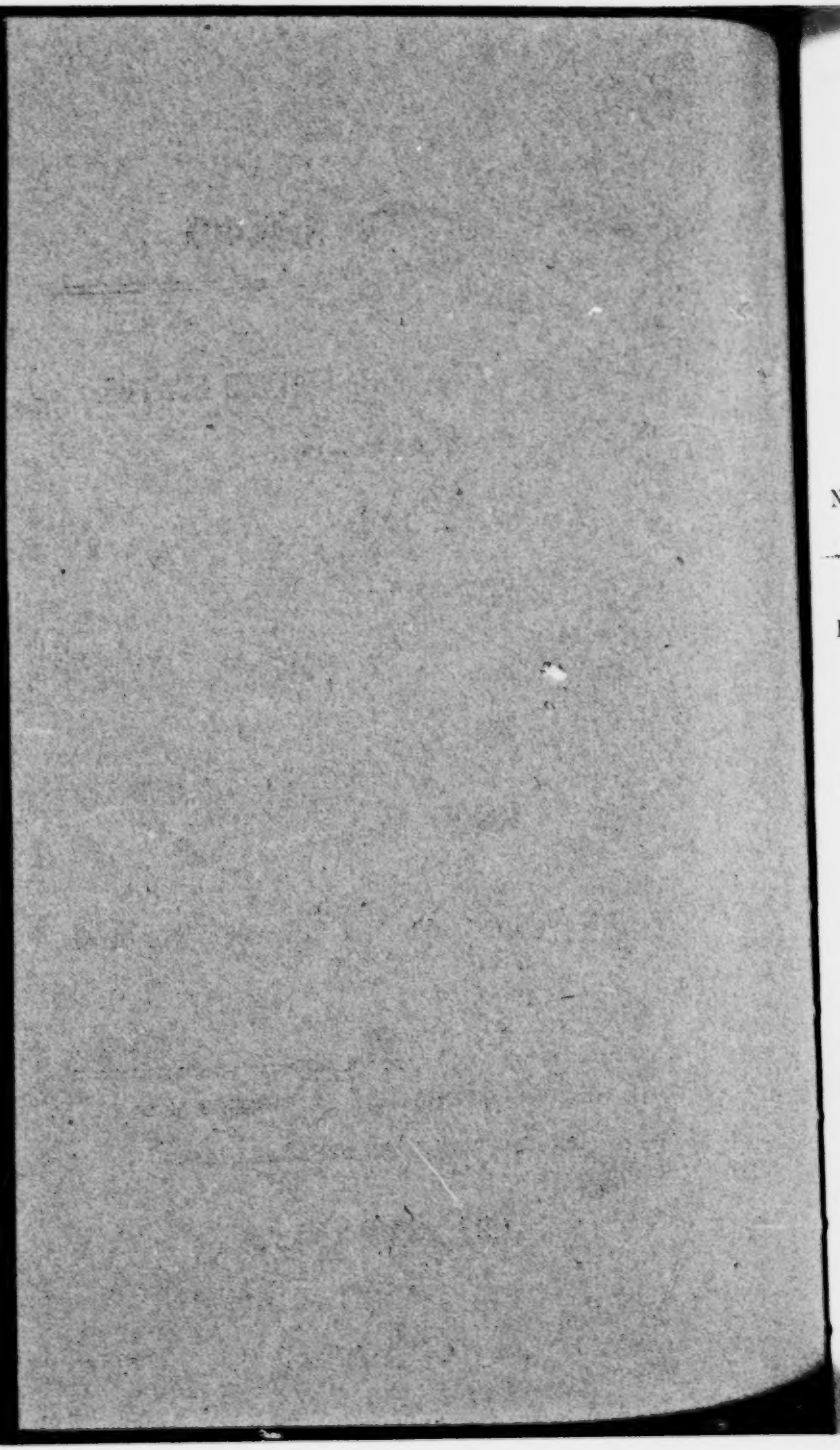
EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 2, 1920.

CERTIORARI AND RETURN FILED FEBRUARY 15, 1921.

(27,992)



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RIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
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No. 3462

United States

Circuit Court of Appeals

For the Ninth Circuit.

NG FUNG HO, Otherwise Known as UNG KIP, NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIM SANG GET and GIM SANG MO,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Names and Addresses of Attorneys of Record.

For Petitioners and Appellants:

GEO. A. McGOWAN, Esquire, San Francisco, Calif.

For Respondent and Appellee:

BEN F. GEIS, Esq., Asst. U. S. Attorney, S. F., Cal.

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

#16,500.

In the Matter of the Application of NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Praecipe for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause and Releasing on Bond.
3. Writ of Habeas Corpus.
4. Return to Writ of Habeas Corpus.
5. Minute Order Submitting Case.
6. Memorandum Opinion and Judgment.
7. Notice of Appeal.
8. Petition for Appeal.
9. Assignment of Errors.

10. Order Allowing Appeal.
11. Stipulation and Order Respecting Immigration Records.
12. Citation on Appeal.

—together with the Certificate of the Clerk attesting the said Record.

Dated, San Francisco, Cal., December 24th, 1919.

GEO. A. McGOWAN,
Attorney for Petitioners and Appellants.

[Endorsed]: Filed Jan. 26, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

16,500.

In the Matter of the Application of NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU; Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable, the United States District Judge now Presiding in the Above-entitled Court:

It is respectfully shown by the petition of the undersigned that Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, otherwise referred to as Louie Pon, Gin Sang Get and Gin Sang Mo, hereinafter referred to as the detained, are unlawfully imprisoned, detained, confined and re-

*Page-number appearing at foot of page of original certified Transcript of Record.

strained of their liberty under the order of and by the direction of the Secretary of the Department of Labor by Edward White, Commissioner of Immigration for the port of San Francisco, or by his subordinates, under his direction, within the State and Northern District of California, Southern Division thereof. That the said imprisonment, detention, confinement and restraint is illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Secretary and the said Commissioner that the detained are alien Chinese persons, who have been found within the United States in violation of the provisions of a law of the United States, to wit, the Chinese exclusion or restriction laws or acts, and that they were therefore subject to be taken into custody and returned to the country whence they came under the General Immigration laws of the United States of [2] America.

That the said Commissioner now holds the said detained in custody under warrants of deportation of the said Secretary of Labor, copies of which are hereunto annexed and marked Exhibit "A," within the State and Northern District of California, Southern Division thereof, and it is the purpose and intention of the said Commissioner to execute the said warrants of deportation by causing the detained to be deported upon the SS. "Nanking" sailing from the port of San Francisco, at 1:00 o'clock P. M. on February 15th, 1919, and unless this court intervene the said detained will be carried away from their domicile within the United States and deprived of their rights, as in this petition hereinafter expressly set forth.

Your petitioner alleges that the detained do not come within the restrictions or provisions of said Immigration Act; but on the contrary, your petitioner alleges that the action of the Secretary of Labor in issuing the said warrants of deportation and each of them was and is in excess of and in violation of the authority conferred upon him in said Act of Congress of February 5, 1917; generally known as the General Immigration Act, and was and is in transgression of one of the sections therein contained, that is to say: that in section 38 of said General Immigration Act of February 5, 1917, there are contained provisions in the words and figures following, to wit:

> "Sec. 38. That this act, except as otherwise provided in section three, shall take effect and be enforced on and after May first, nineteen hundred and seventeen. * * * PROVIDED FURTHER, That nothing contained in this act shall be construed to affect any prosecution, suit, action or proceedings brought, or any act, thing or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters the laws or parts of laws repealed or amended by this act are hereby continued in force and effect." [3]

Your petitioner further alleges that it appears from the warrant of deportation of the detained Ng Fung Ho, otherwise known as Ung Kip, which said

warrant is numbered in the records and files of said Secretary of Labor 54267/51, as follows, to wit:

> "who landed at the port of San Francisco, Cal., ex SS. 'Manchuria,' on the 20th day of July, 1915, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation, under the provisions of a law of the United States, to wit, the Chinese Exclusion laws, in that he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; he re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section; and he has been found in the United States in violation of section 2, Chinese Exclusion Act of November 3, 1893, having secured admission by fraud, not having been at the time of his entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Ng Yuen Shew, which said warrant is numbered in the records and files of said Secretary of Labor 54267/51, as follows, to wit:

"who landed at the port of San Francisco, Cal., ex SS. 'Manchuria' on the 20th day of July, 1915, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese exclusion laws, in that he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; and he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of his entry the minor son of a member of the exempt classes."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Lui Yee Lau, otherwise referred to as Louie Pon, which said warrant is numbered in the records and files of said Secretary of Labor 54372/2, as follows, [4] to wit:

"who landed at the port of Seattle, Washington, ex SS. 'Yokohama Maru,' on the 15th day of April, 1916, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese ex-

clusion law, in that: He has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; and he has been found within the United States in violation of section 6, Chinese Exclusion Act of July 5, 1884, having secured admission on a certificate issued under said section, but having become a laborer since admission."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Gin Sang Get, which said warrant is numbered in the records and files of said Secretary of Labor 54267/57, as follows, to wit:

"who landed at the port of San Francisco, Cal., ex SS. 'China' on the 24th day of July, 1916, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese exclusion laws, in that: He has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Gin Sang Mo, which said warrant is numbered in the rec-

ords and files of said Secretary of Labor 54267/57, as follows, to wit:

> "who landed at the port of San Francisco, Cal., ex SS. 'Shinyo Maru,' on the 28th day of April, 1917, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of the law of the United States, to wit, the Chinese exclusion laws in that: He has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3d, 1893, being a Chinese laborer not in possession of a certificate." [5]

And your petitioner therefore alleges that it is affirmatively shown upon the face of each of said warrants of deportation that the action of the Secretary of Labor in ordering each of the said detained persons deported away from and out of the United States under and in pursuance of the terms of the said General Immigration Act which became effective May 1, 1917, was for an act, thing or matter which had been done or performed prior to the said 1st day of May, 1917, and that for said reason the said action of the said Secretary in attempting to deport out of and away from the United States the said detained Chinese persons for an act, thing or matter which had been done or performed prior to the 1st day of May, 1917, was in excess and in violation of the authority conferred upon the said Secretary and in violation of the said restriction contained in said section 38 of said General Immigration law hereinbefore set

forth, and that for said reason the action of the said secretary in issuing the said warrants of deportation and each of them was and is in excess of his jurisdiction and without the authority conferred upon him by the statute in such cases made and provided.

Your petitioner further alleges that the said detained and each of them do not come within the restrictions or provisions of the said General Immigration law, as charged in said warrants, but on the contrary, your petitioner alleges that the finding of the said Secretary of Labor in each of said cases that the said detained persons violated the said Chinese exclusion and restriction acts, as in each of said warrants of deportation set forth, was in excess of the jurisdiction, powers and authority of the said Secretary, and particularly in violation of the terms and provisions of the acts of Congress of May 6, 1882, July 5, 1884, November 3d, 1893, and April 29th, 1902, as amended and re-enacted by section 5 of the Deficiency Act of April 7th, 1904, which [6] said acts are commonly known and referred to as the Chinese exclusion or restriction acts, which said acts provide that Chinese persons found unlawfully within the United States shall be arrested and accorded a trial before a United States Justice, judge or commissioner, and that the said Secretary of Labor is not one of the judicial officers enumerated in said acts, as having authority to determine the question of the legality or illegality of the residence of Chinese persons charged with being illegally within the United States in violation of said Chinese exclu-

sion or restriction acts hereinbefore enumerated. And your petitioner therefore alleges that the action of the said Secretary of Labor in assuming jurisdiction of the said detained and each of them, and in issuing the warrants of deportation and in each of them, acted in violation of the provisions of the concluding section of the said General Immigration Act hereinbefore mentioned.

Your petitioners further allege upon their information and belief that the alleged hearings and each, every and all of them, upon which and as a result of which the said warrants of deportation were issued by the Secretary of Labor, the Assistant Secretary of Labor or the Acting Secretary of Labor, as the case may be, were and each of said hearings are unfair in this, that there was not evidence in said hearings or any of them to sustain the conclusions and findings of the said Secretary of Labor, Assistant Secretary of Labor or Acting Secretary of Labor, as the case may be, that the detained are Chinese aliens who entered the United States or re-entered the United States, in violation of the said Chinese exclusion or restriction acts, or whose subsequent residence within the United States was in violation thereof, or that they or any of them, the said detained, had practiced fraud or had fraud been practiced upon their behalf or on behalf of each or any of them, in the matter of their admission to the [7] United States, or that they or any of them had gained admission to the United States by means of false and misleading statements, or that they or any of them had entered without inspection, or were per-

sons likely to become public charges at the time of their entry, respectively, to the United States, in violation of the said Chinese exclusion or restriction acts or the said General Immigration Act, and all such said charges are makeweights unsupported by the evidence and in violation thereof and said conclusions or findings of the said Secretary of Labor, Assistant Secretary of Labor, or Acting Secretary of Labor, as the case may be, rest upon conjecture and suspicion and not upon evidence, and that there was no substantial or other evidence to sustain or support the said orders of deportation or any of them, so made as aforesaid, nor had the said Secretary of Labor, Assistant Secretary of Labor, or the Acting Secretary of Labor jurisdiction in the premises, and for each of said reasons the said orders or warrants of deportation and each of them, are in excess of the statutory authority of the officer issuing same, and that his said action in so doing was arbitrary and unfair and therefore subject to judicial review.

That your petitioners are in custody of an officer of the said Commissioner of Immigration, and subject to his restraint, but are permitted to verify this petition upon their own behalf and upon behalf of each of them.

That your petitioners have not in their possession or under their control any copy of the hearings or proceedings hereinbefore mentioned, save the warrants or orders of deportation hereinbefore mentioned and hereunto annexed and marked as exhibit "A" as aforesaid. Your petitioners allege,

however, that upon the production of the Immigration Records by the respondent, they do stipulate that the said records may be considered with the same force and effect as if filed with this petition and as exhibits in support and explanation thereof. [8]

That a former application for a writ of habeas corpus was presented in three separate cases upon behalf of different of your petitioners, but that the point herein made was not advanced in any of said petitions, and that the appeals taken from the orders denying said petitions were dismissed by consent of counsel for the respective parties thereto, so that the points herein advanced might be adjudicated. During the pendency of the said former habeas corpus proceedings the detained were each released upon bond in the sum of $1,000, and during the pendency of the proceedings before the said officials of the Department of Labor the said detained were each released upon bond.

WHEREFORE, your petitioners pray that a writ of habeas corpus issue herein, as prayed for, directed to the said Commissioner commanding him to produce the bodies of the said detained together with the time and cause of their detention, before your Honor at a time and place to be therein specified, to the end that the cause of the detention of the said detained may be enquired into, that they may be relieved of restraint and that they may be discharged from custody and go forth without day.

Dated, San Francisco, Cal., January 27th, 1919.

(Chinese Char.) NG FUNG HO,
(Chinese Char.) NG YUEN SHEW,
LUI YEE LAU,
GIN SANG GET,
GIN SANG HO,
Petitioners,

GEO. A. McGOWAN,
Attorney for Petitioners, Bank of Italy Building, Montgomery and Clay Streets, San Francisco, California. [9]

State and Northern District of California,
City and County of San Francisco.—ss.

Ng Fung Ho, Ng Yuen Shew, Lui Yee Lau, Gin Sang Get and Gin Sang Mo, being first sworn upon oath, each for himself and not one for the other, do depose and say:

That they are the petitioners named in the foregoing petition; that the same has been read and explained to them and that they know the contents thereof; and that the same is true of their own knowledge except as to those matters which are therein stated on their information and belief, and as to those matters they believe it to be true.

(Chinese Char.) NG FUNG HO.
(Chinese Char.) NG YUEN SHEW.
LUI YEE LAU.
GIN SANG GET.
GIN SANG MO.

Subscribed and sworn to before me this 27th day of January, 1919.

[Seal] C. M. TAYLOR,
Deputy Clerk, U. S. District Court, Northern District of California.

[Here follows Exhibit "A"—Warrants of Deportation.] [10]

[Endorsed]: Service of the within petition and the order to show cause and releasing upon bail, issued thereon, are hereby admitted and receipt of copies thereof are hereby admitted this 27th day of January, 1919.

BEN F. GEIS,
Asst. United States Attorney.
P. A. ROBBINS,
For the Commissioner of Immigration for the Port of San Francisco, Cal.

Filed Jan. 27, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [11]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

#16,500.

In the Matter of the Application of NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW, LUI YEE LAU, Otherwise Referred to as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Order to Show Cause and Releasing upon Bail.

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 29th day of January, 1919, at the hour of ten o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not issue herein as prayed for; and that a copy of this order be served upon said commissioner, and a copy of said petition upon the United States Attorney.

And it is further ordered that the said Edward White, Commissioner of Immigration as aforesaid, or whoever acting under the orders of the said commissioner, or the Secretary or Labor, shall have the custody of the said detained herein, are hereby ordered and directed to retain the said detained persons within the jurisdiction of this court until its further order herein.

And it is further ordered, that the said detained may each be released upon bond during the further proceedings to be had herein upon each individually giving a bond in the sum of $1,000, the said sum being the same amount fixed in the prior habeas corpus proceedings mentioned in the petition herein, and the United States marshal for this District is hereby authorized to take the said detained persons and each of them into his custody for the purpose of effecting their release upon bond as herein pro-

vided. Said bonds to be furnished by a surety company.

Dated, San Francisco, Cal., January 27th, 1919.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jan. 27, 1919. W. B. Maling, Clerk. C. M. Taylor, Deputy Clerk. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Alias UNG KIP, NG YUEN SHEW, LUI YEE LAU, Alias LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, Calif., GREETING:

YOU ARE HEREBY COMMANDED that you have the bodies of the said persons by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever names the said persons shall be called or charged before the Honorable Maurice T. Dooling, Judge of the United States District Court for the Northern District of California, at the court-

room of said court, in the City and County of San Francisco, California, on the 15th day of February, A. D. 1919, at 10 o'clock A. M. to do and receive what shall then and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the 8th day of February, A. D. 1919.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [13]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named Edward White, Commissioner of Immigration, by handing to and leaving a true and correct copy thereof with Edward White, Commmissioner of Immigration, personally at San Francisco, in said District, on the 10th day of February, A. D. 1919.

J. B. HOLOHAN,
U. S. Marshal.
By Geo. H. Burnham,
Deputy.

[Endorsed]: Filed Feb. 14, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [14]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Otherwise Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Otherwise Referred to as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Return to Writ of Habeas Corpus.

Comes now Edward White, Commissioner of Immigration at the Port of San Francisco, by P. A. Robbins, Immigration Inspector, and in return to said petition for a writ of habeas corpus, admits, denies and alleges as follows:

I.

DENIES that Ng Fung Ho, otherwise known as Ung Kip, or Ng Yuen Shew, or Lui Yee Lau, otherwise referred to as Louie Pon, or Gin Sang Get, or Gin Sang Mo, or either or any of them, are unlawfully imprisoned, detained, confined and restrained, or unlawfully imprisoned, or detained, or confined, or restrained of their liberty under the order of and by, or under the order of, or by, the direction of the Secretary of the Department of Labor by Edward White, Commissioner of Immigration for the Port of San Francisco, or by his subordinates, or either of them, or by any person or persons whatever within the State and Northern

District of California, Southern District thereof, or elsewhere, or at all.

II.

DENIES that the alleged imprisonment, or detention, [15] or confinement, or restraint, is illegal and particularly in respect to the matter and things alleged in the petition herein, as constituting the illegality, or either or any of them.

III.

DENIES that the said detained, or either or any of them, will be deprived of their rights, or of any right by being deported under or pursuant to said alleged warrants, and in this connection alleges the fact to be that the said detained and each of them were arrested for a violation of the laws respecting the entry of alien Chinese into the United States under and pursuant to a warrant of the Secretary of Labor of the United States, duly and regularly issued and served upon the detained and each of them; that thereafter and heretofore, said detained and each of them were given a full and fair hearing before an Immigrant Inspector, as provided by law; that the said detained and each of them were thereafter and heretofore ordered deported by the said Secretary of Labor, Assistant Secretary of Labor, Acting Secretary of Labor, by warrants duly and regularly issued, as shown by the record of and in the several cases of the said detained; that all the said proceedings, orders and warrants were had, made and issued as provided by and in conformity with the laws, rules and regulations in such cases made and provided.

IV.

DENIES that the action of the Secretary of Labor in issuing the warrants of deportation, or either, or any of them, was or is in excess of, or in violation of the authority conferred upon him by said Act of Congress of February 5, 1917, generally known as the General Immigration Act, or was, or is, [16] in transgression of section 38, or any section of said Act of February 5, 1917, and in this connection alleges the fact to be that the said detained persons, prior to, and at the time of their arrest, were subject to arrest and deportation under and pursuant to the provisions of the said Act of Congress of February 5, 1917, and particularly under and pursuant to the provisions of sections 19 and 38 of said Act, said sections being in part as follows:

Section 19 of said Act provides:

> "That at any time within five years after entry, any alien who shall have entered or shall be found in the United States in violation of any of the laws of the United States, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. PROVIDED, FURTHER, that the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States."

Section 38 provides:

> "That this act, except as otherwise provided, in Section 3, shall take effect and be in force on and after May 1, 1917. * * * PROVIDED,

that this act shall not be construed to repeal, alter, or amend existing laws relating to the Immigration or exclusion of Chinese persons, or persons of Chinese descent, EXCEPT AS PROVIDED IN SECTION 19 HEREOF. * * * PROVIDED, FURTHER, that nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing or matter civil or criminal, done, or existing at the time of the taking effect of this act, EXCEPT AS MENTIONED IN THE THIRD PROVISO OF SECTION 19 HEREOF."

V.

DENIES that the action of the said Secretary in attempting to deport out of, or away from, the United States, the said detained persons for an act or thing, or matter, which had been done, or performed, prior to the first day of May, 1917, was in excess or in violation of the authority conferred upon the said Secretary, or in violation of said [17] Section 38 of said General Immigration Act, or of any part thereof of said Section, or of said Act, and in this connection alleges the fact to be that the action of the said Secretary of Labor, in issuing his warrant of deportation for the deportation of said detained and each of them, was within the power and authority conferred upon the said Secretary under and pursuant to the said General Immigration Laws and the then existing laws of the United States in such cases made and provided.

VI.

DENIES that the action of the said Secretary, or either of them, in issuing the said warrants of deportation, or either or any of them, was or is in excess of his jurisdiction or without the authority conferred upon him by the statutes in such cases made and provided.

VII.

DENIES that the detained, or either or any of them, do not come within the restrictions and provisions of the said General Immigration Law, as charged in said warrants, but allege the fact to be that each of the detained come within the restrictions and provisions of the said General Immigration Laws, as charged in the said warrants.

VIII.

DENIES that the finding of the said Secretary of Labor in each or any of said cases, that the said detained persons violated the Chinese Exclusion and Restriction Acts, as in each of said warrants of deportation set forth, was in excess of the jurisdiction, powers or authority of the said Secretary, or in violation of the terms, or provision of the acts of Congress of May 6, 1882, or July 5, 1884, or November 3, 1893, or April 29, 1902, or any of said Acts [18] as amended and re-enacted, or amended, or re-enacted by Section 5 of the Deficiency Act of April 7, 1904, commonly known and referred to as the Chinese Exclusion or Restriction Acts.

IX.

DENIES that the action of the said Secretary of Labor, in assuming jurisdiction of the said detained,

either or any of them, or in issuing the warrants deportation, or in either or any of them, acted in olation of the provisions of the concluding section any section of the General Immigration Act here- oefore mentioned.

X.

DENIES that the hearings, or either or any of em, upon, or as a result of which said, or either of id warrants of deportation were issued by the ecretary of Labor, or the Assistant Secretary of abor, or the Acting Secretary of Labor, were, or re, unfair, in any way whatever, but alleges the fact o be that the said hearings and each of them were nd are in all respects manifestly fair and impar- ial.

XI.

DENIES that there was no evidence in said hear- ngs and in each of said hearings to sustain the conclusions and findings, or conclusions, or findings, of the Secretary of Labor and Assistant Secretary of Labor and Acting Secretary of Labor, or either, or any of them, that the detained are Chinese aliens who entered the United States, or re-entered the United States in violation of the said Chinese Exclu- sion and Restriction Acts, and whose subsequent residence within the United States was in violation thereof, and that they, and each of them, the said de- tained, had practiced fraud, and had fraud practiced upon their behalf, and on behalf [19] of each of them in the matter of their admission to the United States, and that they, and each of them, had gained admission to the United States by means of false and

misleading statements, and that they, and each of them, had entered without inspection, and were persons likely to become public charges at the time of their entry to the United States in violation of the said Chinese Exclusion and Restriction Acts, and the said General Immigration Act.

XII.

DENIES that all or any of said charges are makeweights or unsupported by the evidence, or in violation thereof, or that said conclusions, or any of them, or findings, of any of them, of the said Secretary of Labor, Assistant Secretary of Labor, or Acting Secretary of Labor, or either or any of them, rest upon conjecture, or suspicion, or are not supported by evidence.

XIII.

DENIES that there was no substantial evidence, or other evidence to sustain and support the said orders of deportation and each of them, and DENIES that the Secretary of Labor and Assistant Secretary of Labor and the Acting Secretary of Labor did not have jurisdiction in the premises, and DENIES that the said orders or warrants of deportation, or either or any of them, are in excess of the statutory authority of the officer issuing them, or that his, or either of their said action in so doing was arbitrary or unfair, or subject to judicial review, and in this connection alleges the fact to be that there was evidence in said hearings, and each of them, to sustain the findings and conclusions of the Secretary of Labor, Assistant Secretary of Labor and Acting Secretary of Labor, as the case may be, [20] that

he detained and each of them are Chinese aliens who ntered the United States, or re-entered the United States in violation of the said Chinese Exclusion or Restriction Acts and whose subsequent residence within the United States was in violation thereof, and that they and each of the said detained had practiced fraud and had fraud practiced on behalf of each of them in the matter of their admission to and into the United States, and that they and each of them had gained admission to the United States by means of false, fraudulent and misleading statements and that they and each of them had entered without inspection and were persons likely to become public charges at the time of their entry, respectively, to the United States, in violation of the said Chinese Exclusion and Restriction Acts, and the said General Immigration Act; that the findings and conclusions of said Secretary of Labor, Assistant Secretary and Acting Secretary of Labor, and of each of them, is sustained and supported by the evidence; that the orders of deportation and each of them are supported and fully sustained by competent, substantial and sufficient evidence that the said Secretary of Labor, Assistant Secretary of Labor and Acting Secretary of Labor, and each of them, when acting, respectively had full power, authority and jurisdiction in the premises to so act; that the orders and warrants of deportation and each of them were within the power, jurisdiction and statutory authority of the said officers issuing them, respectively, and that in the exercise of the said power and authority they and each of them

acted within and under the authority, conferred upon them and each of them by law, and the said officers did not, nor did either of them, in the exercise of their said authority act arbitrarily, but acted with fairness, impartiality and within the [21] discretion conferred upon them and each of them by the law in such cases made and provided.

WHEREFORE, respondent prays that the said petition be denied and said Ng Fung Ho, otherwise known as Ung Kip; Ng Yuen Shew; Lui Yee Lau; otherwise referred to as Louie Pon; Gin Sang Get and Gin Sang Mo be remanded to the custody of respondent for deportation and for such other and further relief as this Court seems equitable and just.

ANNETTE ABBOTT ADAMS,
United States Attorney.
BEN F. GEIS,
Asst. United States Attorney. [22]

United States of America,
Northern District of California.
City and County of San Francisco,—ss.

P. A. Robbins, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the Port of San Francisco, and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to the writ of habeas corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that

affiant's knowledge the matters set forth in the turn to the writ of habeas corpus are true, except- g those matters which are stated on information nd belief, and that as to those matters he believes to be true.

P. A. ROBBINS.

Subscribed and sworn to before me this 14th day f February, 1919.

[Seal] C. W. CALBREATH,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 15, 1919. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [23]

At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the fifteenth day of February, in the year of our Lord one thousand, nine hundred and nineteen. PRESENT: The Honorable MAURICE T. DOOLING, Judge.

No. 16,500.

In the Matter of NG FUNG HO et al., on Habeas Corpus.

(Hearing on Return to Writ of Habeas Corpus.)

This matter came on regularly this day for hearing. Geo. A. McGowan, Esq., was present on behalf of petitioner and detained. B. F. Geis, Esq.,

Assistant United States District Attorney, was present on behalf of the United States. After hearing the respective attorneys, the Court ordered that said matter be submitted on brief to be filed by respondent in ten (10) days. Return to writ of habeas corpus was presented and filed by respondent. [24]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

(Opinion and Order Quashing Writ of Habeas Corpus and Remanding Prisoners to Custody.

GEO. A. McGOWAN, Esq., Attorney for Petitioners.

ANNETTE ABBOTT ADAMS, United States Attorney, and BENJ. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

MEMORANDUM.

RUDKIN, District Judge.

Section 19 of the Immigration Act of February 5, 1917, contains numerous provisions for the deportation of aliens from the United States. In some in-

stances a time limit of three years from the date of entry is imposed, in others a time limit of five years, while in still others there is no time limit at all. The third proviso to the section reads as follows:

> "Provided further, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of *the of* their entry into the United States."

The repealing clause found in section 38 of the act contains the following proviso: [25]

> "Provided further, That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

The petitioner has been ordered deported by the immigration authorities and the sole question before the Court is may a Chinese subject who entered the United States prior to the taking effect of the Immigration Act of February 5, 1917, be deported under its provisions. It will readily be conceded that the act is awkwardly worded to say the least. Exception is grafted on to exception and proviso on to proviso until the meaning, in some instances at least, is well nigh incomprehensible, as is too often the

case with bureaucratic legislation. The office of a proviso is usually to limit or qualify the enacting clause, but this rule has little application to Congressional legislation, because it is a well known fact that new and independent legislation is often enacted under the guise of a proviso to a pending bill. Such is the third proviso to section 19 of the act in question. It enlarges or at least explains what has gone before. On the other hand, the second proviso to section 38 is a proper application of the term. If the proviso to section 38 excepted generally from the provisions of the act, all prosecutions, suits, actions, proceedings, acts, things or matters done or existing at the time of its taking effect, it would doubtless receive the same construction as has been given a [26] similar provision found in section 299 of the Judicial Code, and the act would then be inapplicable to aliens in the United States at the time of its taking effect. But there is excepted from this general saving clause the cases mentioned in the third proviso to section 19 and that proviso is expressly made applicable to all classes of aliens irrespective of the time of their entry into this country. True there is excepted from the third proviso "the exception hereinbefore noted" which doubtless has reference to the time limit imposed on the deportation of certain classes of aliens, but inasmuch as no Court would permit the deportation of an alien after the time fixed by law for such deportation had expired, simply because the act was made reactive, the exception is meaningless. In other words the words last quoted are superfluous

and add nothing to or take nothing from the statute as a whole. If the statute is given the construction contended for by the petitioner it would seem that the third proviso to section 19 is entirely nullified. The sole purpose of that proviso was to make the statute retroactive or applicable to aliens in the United States at the date of its passage and if the repealing clause defeats that purpose there is a plain and manifest repugnancy between the two provisions. Such a conclusion will be avoided, if possible, and I am clearly of opinion that Congress intended that aliens of every class unlawfully in the United States should be subject to deportation under th act regardless of the time of their entry.

I regret the necessity which compels me to disagree with the Circuit Court of Appeals of the Fifth Circuit in Mayo vs. United States, 251 Fed. 275, where the [27] same question was involved, but if consolation be needed I find it in the silent dissent of one of the members of that court.

The writ of habeas corpus is quashed and the prisoners remanded to the custody of the immigration authorities.

[Endorsed]: Filed Jun. 2, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to ANNETTE ABBOTT ADAMS, United States Attorney for the Northern District of California.

YOU and each of you will please take notice that Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, the petitioners herein, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made and entered herein on the 2d day of June, 1919, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners to the custody of the Immigration authorities.

Dated, San Francisco, California, June 23d, 1919

GEO. A. McGOWAN,

Attorney for Petitioners and Appellants Herein.

[29]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Petition for Appeal.

Come now Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, the detained and petitioners, who are the appellants herein and say:

That on the 2d day of June, 1919, the above-entitled court made and entered its order and judgment herein, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners to the custody of the immigration authorities, in which said order and judgment certain errors are made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and

transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

It is further prayed that during the pendency of the said [30] appeal that the said Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo may retain their liberty and remain at large under the order heretofore made herein, provided that they remain within the United States and render themselves in execution of whatever judgment is finally entered herein.

Dated, San Francisco, California, June 23d, 1919.

GEO. A. McGOWAN,

Attorney for Petitioners, Detained and Appellants Herein. [31]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Assignment of Errors.

Come now Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, the petitioners and appellants herein, by their attorney Geo A. McGowan,

Esquire, in connection with their petition for appeal herein, assign the following errors which they aver occurred upon the trial or hearing of the above-entitled cause, and upon which they will rely upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

FIRST: That the Court erred in quashing the writ of habeas corpus issued herein and remanding the petitioners to the custody of the immigration authorities.

SECOND: That the Court erred in not holding that the allegations contained in the petition herein for a writ of habeas corpus, and the facts presented upon the issue made and joined herein were sufficient in law to justify the discharge of the petitioners from custody as prayed for in said petition.

THIRD: That the judgment made and entered herein is contrary to law. [32]

FOURTH: That the judgment made and entered herein is not supported by the evidence.

FIFTH: That the judgment made and entered herein is contrary to the evidence.

SIXTH: That the Court erred in holding that the Secretary of Labor had jurisdiction to deport for a violation of the Chinese exclusion law by the executive process provided for in section 19 of the Immigration Act of February 5th, 1917, Chinese persons who entered the United States prior to May 1, 1917, the date of the taking effect of the said Immigration Act.

SEVENTH: That the Court erred in holding that a Chinese person domiciled in the United States of

America charged solely with a violation of the Chinese exclusion law could be deported therefor in an executive deportation proceeding as provided for in the general immigration law.

EIGHTH: That the Court erred in holding that there was sufficient or any evidence submitted before the Secretary of Labor to show that there was a likelihood of the petitioner and appellant Lui Yee Lau known as Louie Pon, becoming a public charge at the time of his entry into the United States within the meaning and as the said term is used in the general immigration law.

NINTH: That the Court erred in holding that there was sufficient or any evidence submitted before the Secretary of Labor to show that the petitioners and appellants Gin Sang Get and Gin Sang Mo entered the United States without inspection.

TENTH: That the Court erred in holding that there was sufficient evidence or any evidence submitted before the Secretary of Labor to show that the petitioners and appellants Gin Sang Get and Gin Sang Mo entered the United States without inspection by means of false and misleading statements.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court for the Northern Division of [33] California, Southern Division, First Division, made and entered herein in the office of the Clerk of said Court on the second day of June, 1919, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners into the custody of the immigration authorities be reversed, and that this cause

remanded to said lower court with instructions discharge the said Ng Fung Ho, known as Ung Ng Yuen Shew, Lui Yee Lau, known as Louie on, Gin Sang Get and Gin Sang Mo from custody as prayed for in the petition for a writ of habeas rpus herein.

Dated, San Francisco, California, June 23d, 1919.

GEO. A. McGOWAN,
Attorney for Appellants.

[Endorsed]: Service of the within Notice of Appeal, Petition for Allowance of an Appeal, and Assignment of Errors, and receipt of a copy of each hereof is hereby admitted this 23 day of June, A. D. 919.

ANNETTE ABBOTT ADAMS,
United States Attorney.

Filed Jun. 24, 1919. W. B. Maling, Clerk. By C. . Calbreath, Deputy Clerk. [34]

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n the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,500.

n the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Order Allowing Appeal.

On this 23d day of June, 1919, come Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, petitioners and appellants herein, by their attorney, George A. McGowan, Esquire, and present to this Court their notice of appeal, petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors to be relied upon on said appeal, from the order and judgment made and entered herein on the second day of June, 1919, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners to the custody of the immigration authorities, which said appeal is intended to be urged and prosecuted by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit to the end that their prayer that the said judgment may be reversed might be heard and determined, and that such other and further proceedings may be had in the premises as may seem proper. [35]

In consideration whereof, this Honorable Court does hereby allow the appeal herein prayed for, and orders and directs that the execution of the warrants of deportation made by the Secretary of Labor against each of the said petitioners and detained be stayed pending a hearing and final determination of

the said cases in the United States Circuit Court of Appeals for the Ninth Circuit.

And it is further ordered, that the said Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get, and Gin Sang Mo may retain their liberty and remain at large during the continuance of the appeal proceedings herein under the order heretofore made herein upon the bonds heretofore given herein, provided that said petitioners and appellants remain within the United States and render themselves in execution of whatever judgment is finally entered herein.

Dated, San Francisco, California, June 23d, 1919.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: Filed Jun. 24, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [36]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIM SANG GET and GIM SANG MO, on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

IT IS HEREBY STIPULATED AND AGREED

by and between the attorney for the petitioners and appellants herein, and the attorney for the respondent and appellee herein, that the original immigration records in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer and upon the return to the writ in the above-entitled matter may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this Court.

Dated, San Francisco, California, June 23d, 1919.

GEO. A. McGOWAN,
Attorney for Petitioners Appellants.

ANNETTE ABBOTT ADAMS,
United States Attorney for the Northern District of California, Attorney for Respondent and Appellee. [37]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration records therein referred to may be withdrawn from the office of the clerk of this court, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, said withdrawal to be made at the time the record on appeal herein is cer-

tified to by the clerk of this court.

E. S. FARRINGTON,
United States District Judge.

Dated, San Francisco, California, June 23d, 1919.

[Endorsed]: Filed Jun. 23, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [38]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 38 pages, numbered from 1 to 38, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the matter of Ng Fung Ho. etc., et al., on Habeas Corpus, No. 16,500, as the same now remain on file and of record in this office; said transcript having been prepared in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for petitioners and appellants herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of fourteen dollars and thirty-five cents ($14.35), and that the same has been paid to me by the attorney for the appellants herein.

Annexed hereto is the original Citation on Appeal, issued herein (page 40.)

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said District Court, this 3d day of March, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [39]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hon. Edward White, as Commissioner of Immigration for the Port of San Francisco, and to Annette Abbott Adams, U. S Attorney, His Legal Representative Herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the Southern Division of the United States District Court for the Northern District of California, wherein Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, otherwise referred to as Louie Pon, Gin Sang Get and Gin Sang Mo, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Southern Division of the United States District Court for the Northern District of California, this 29th day of November, A. D. 1919.

FRANK H. RUDKIN,
United States District Judge, [40]

[Endorsed]: No. 16,500. Southern Division of the United States District Court for the Northern District of California. In re Ng Fung Ho, et al., on Habeas Corpus, Appellants, vs. Edward White, as Commissioner, etc., Appellee. Citation on Appeal. Filed Nov. 29, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk,

Copy of the within citation on appeal lodged with me this 29th day of November, 1919.

W. B. MALING,
Clerk Southern Division of the U. S. District Court,
Northern District of California.
By C. M. Taylor,
Deputy Clerk.

Service of the within citation and receipt of a copy thereof is hereby admitted this 29th day of November, 1919.

ANNETTE ABBOTT ADAMS,
U. S. Attorney.

[Endorsed]: No 3462. United States Circuit Court of Appeals for the Ninth Circuit. Ng Fung Ho, Otherwise Known as Ung Kip, Ng Yuen Shew; Lui Yee Lau, Otherwise Referred to as Louie Pon;

Gim Sang Get and Gim Sang Mo, Appellants, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed March 3, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of Geo. A. McGowan, Esq., attorney for the petitioners and appellants herein,—

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit may be and

the same hereby is extended for a period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, February 25th, 1920.

WM. B. GILBERT,
United States Circuit Judge.

Service of the within order extending time to docket case, and receipt of a copy thereof, is hereby admitted this 25th day of February, 1920.

ANNETTE ABBOTT ADAMS,
United States Attorney, for the Northern District of California.

[Endorsed]: No. 16,500. In the Southern Division of the United States District Court, for the Northern District of California, First Division. In the Matter of Ng Fung Ho, Known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, Known as Louie Pon, Gin Sang Get and Gin Sang Mo. On Habeas Corpus. Order Extending Time to Docket Case.

No. 3462. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16, Enlarging Time to March 26, 1920, to File Record Thereof and to Docket Case. Filed Feb. 25, 1920. F. D. Monckton, Clerk. Refiled March 3, 1920. F. D. Monckton, Clerk.

[Endorsed]: Printed Transcript of Record. Filed May 13, 1920. F. D. Monckton, Clerk.

No. 3462

United States
Circuit Court of Appeals
For the Ninth Circuit.

G FUNG HO, Otherwise Known as UNG KIP, NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIM SANG GET and GIM SANG MO,

Appellants,

vs.

DWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

PROCEEDINGS HAD IN THE NITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twentieth day of May, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3462.

NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Order of Submission.

ORDERED appeal in the above-entitled cause argued by Mr. George A. McGowan, counsel for the appellants, Mr. Assistant United States Attorney Ben F. Geis, counsel for the appellee, submitting cause on brief on file, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the sixth day of July, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine Ross and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * Ng Fung Ho, Otherwise Known as Ung Kip, Ng Yuen Shew; Lui Yee Lau, Otherwise Referred to as Louie Pon; Gim Sang Get and Gim Sang Mo, Appellants, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. No. 3462. * * *

n the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

G FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

Appellants,

vs.

DWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Opinion U. S. Circuit Court of Appeals.

ppeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

efore GILBERT, ROSS and HUNT, Circuit Judges.

UNT, Circuit Judge:

The appellants, Ng Fung Ho, *alias* Ung Kip, Ng uen Shew, Lui Yee Lau, *alias* Louie Pon, Gin Sang et and Gin Sang Mo, are five Chinese persons who ve been ordered deported from the United States der executive deportation procedure for violations the Chinese Exclusion Law (Act of May 6, 1882, d amendments). All of the appellants arrived in e United States prior to May 1, 1917, on which date amendatory statute, known as the General Immiation Law, became effective.

The first question for decision is whether the Secretary of Labor, under section 19 and 38 of the Immigration Act of 1917, and within the limitations stated therein, had authority to arrest and deport on departmental warrant, alien Chinese persons found within the United States in violation of the Chinese Exclusion Law, where entry was made prior to the date the above referred to act went into effect *i. e.,* May 1, 1917.

Pertinent excerpts from the two statutes are as follows: Act of February 20, 1907, section 20:

> "That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States."
>
> Section 21: "That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by Section 20 of this Act."

Act of February 5, 1917, Section 19:

> "That at any time within five years after entry any alien who shall have entered, or who

shall be found, in the United States in violation of this Act, or in violation of any other law of the United States, . . . shall, upon the warrant of the Secretary of Labor be taken into custody and deported. . . . Provided, further, that the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States." (Third Proviso.)

Section 38: "This act, except as otherwise provided in section 3, shall take effect and be in force on and after May 1, 1917. . . . Provided, that this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent except as provided in section 19, hereof. . . . Provided, further, that nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceeding brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section 19 hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect.

It will be seen that section 38 contains two exceptions: First "except as provided in section 19 hereof," and second, "except as mentioned in the third proviso of section 19 hereof." Inasmuch as

these exceptions were not included in sections 43 and 28 of the earlier Act of Congress (1907), it is to be assumed they have relation to the sections of the act of 1917 wherein they appear. Their effect is to modify and restrict the provisions of which they are a part, and we think that they accomplish this by excluding from the other provisions of the provisos the classes of aliens enumerated in section 19, to which the exceptions have reference. Section 19 at great length enumerates the classes of aliens subject to arrest and deportation by warrant of the Secretary of Labor and fixes the time where a limit is specified within which aliens subject to arrest may be taken into custody and deported and by the third proviso hereinbefore quoted, with the "exceptions hereinbefore" noted, the provisions of section 19 are applicable to the classes of aliens mentioned without regard to the time of the entry of such classes into the United States. The classes of aliens are not enumerated in the proviso to section 19, but they are clearly referred to. They are also included within the exception to the first proviso of section 38 by reference to the exception as provided in section 19, and also in the exception to the second proviso of section 38 where again reference is made to the exceptions mentioned in the third proviso of section 19. We gain assistance as to the intent of Congress from the report of the Senate Committee on Immigration which had under consideration the bill for the Immigration Act of 1917. The committee (64th Congress Senate Report, No. 352), referred to the provision of section 19 as being made retroactive

"with certain exceptions." It is true that the committee failed to express what "certain exceptions" it had in mind, but the context shows that the exceptions referred to were those "hereinbefore noted" as referred to in the third proviso of section 19. Among the exceptions noted and referred to are these: An alien who shall have entered or who shall be found in the United States in violation of the Act of February 5, 1917; an alien who is hereafter sentenced to imprisonment for one year or more because of conviction in the United States of a crime involving moral turpitude committed within five years after the entry of the alien into the United States; an alien who is hereafter sentenced more than once to a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry. The statute is prospective as to those aliens who enter the United States in violation of the act, while as to the other classes the act is retroactive as to the time of the entry of the alien, but prospective in relation to conviction. Notwithstanding the difficulty of construction, it is quite evident that the purpose of the proviso was to make section 19 applicable without regard to the time of entry into the United States. By changing the language used in the Act of February 20, 1907, so as to make the act apply not only to those "who shall enter," but to those "who shall have entered," there is evidence of intent to make the provisions of section 19 retroactive. Again the report of the committee helps to clearer understanding by the statement that it was intended to continue

the practice established under the Act of 1907 "of expelling aliens who enter or are found here in violation of the Chinese Exclusion Law, adapting the administrative process of the Immigration Act to that class of cases wherever the proceedings are instituted within the periods of limitation specified therein."

Considering it in all its words and in the light of the Senate report, we construe the law to be that an alien who shall have entered or who shall be found in the United States in violation of the Chinese Exclusion Law, shall, at any time within five years after entry and irrespective of the time of entry, whether before or after the passage of the Act of 1917, be taken into custody on the warrant of the Secretary of Labor. In Mayo, Commissioner ex rel. Lee Wong Hin, 251 Fed. 275, the Court of Appeals for the Fourth Circuit, Judge Walker dissenting, expressed a different view. It does not appear, however, that the learned Court had the benefit of the report of the Senate Committee as an aid in the construction of the provisions of the act. But, however that may be, the conclusion we have reached seems to us to be correct and to call for decision in favor of the jurisdiction exercised by the Secretary of Labor. Woo Jan vs. United States, 245 U. S. 552, cited by appellants was decided after the Immigration Act of 1917 was passed and made no reference to the amended or new Immigration Law.

Ng Fung Ho, *alias* Ung Kip, and Ng Yuen Shew were arrested on warrants issued by the Assistant Secretary of Labor, dated September 20, 1917, charged

with being found in the United States in violation of the Chinese Exclusion Law. They were duly arraigned, notified of their rights, had counsel, waived the right to have witnesses subpoenaed and presented their claims by brief filed by counsel. Thereafter the aliens were ordered deported and warrants of deportation were issued. There was evidence from which the conclusion was authorized that Ng Fung Ho, *alias* Ung Kip, at the time of his departure for China was not a merchant within the meaning of the law, but was a laborer and had been a laborer for years before his departure for China, and that when he returned to the United States he again became a laborer. It was therefore found that his reentry was accomplished by falsehood and fraud and that he could not re-enter as a laborer and did not have a laborer's certificate as provided by law. Inasmuch as the son Ng Yuen Shew, to enter, depended upon the status of the father, the decision that the son could not enter must be sustained. Ng Neong vs. White, 260 Fed. 749.

Lui Yee Law was arrested on Departmental warrant dated February 16, 1918, and charged with being in the United States in violation of the Chinese Exclusion Law in that he was a laborer not possessing a certificate of residence; that tho entering as a merchant he has become a laborer; and also that he was a person likely to become a public charge at the time that he entered the United States. He had originally entered in 1915 as a merchant with a section 6 certificate. He was arraigned, had a hearing, was represented by counsel and in due course was

ordered deported and warrant issued. In a judicial proceeding had some time before the present proceeding, it was held that although the mercantile status of the alien when he entered the United States had not been successfully challenged, nevertheless there was evidence to sustain the Department of Labor in holding that the man was a gambler and had been a gambler for some months before his arrest and thus the question was raised whether he was a person likely to become a public charge. The evidence tended to show that about January, 1918, the alien lived in Texas where he was a professional gambler; that about that time he was arrested in a gambling-room; that he pleaded guilty to the charge of gambling and was fined twenty-five dollars. We agree with the ruling that there is nothing to show that the alien obtained his section 6 certificate by fraud or that it was untrue. Lui Hip Chin vs. Plummer, 238 Fed. 763; but upon the evidence we are unable to find that the alien was likely to become a public charge at the time he entered the United States. Having entered in 191—, after producing a section 6 certificate, and not having been a public charge, we cannot see that an arrest in January, 1918, and a plea of guilty and the payment of a fine of twenty-five dollars tends to prove that the alien had criminal tendencies when he arrived in the United States, or was likely to become a public charge. Gegiou vs. Uhl, 239 U. S. 3; Howe vs. United States, 247 Fed. 292; Ex parte Hill, 245 Fed. 687; Ex parte Mitchell, 256 Fed. 229.

In Howe vs. United States, 247 Fed 292, the Court

of Appeals for the Second Circuit held that the words "likely to become a public charge" are meant to exclude only those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future. This ruling was followed in Ex parte Mitchell, 256 Fed. 229, the Court citing Geigou vs. Uhl, 239 Fed. 229. We agree with those constructions and therefore conclude that the appellant Lui Yee Lau is entitled to a reversal of the judgment against him and to an order of discharge.

Appellants Gin Sang Get and Gin Sang Mo, claiming to be brothers, were arrested under warrants dated in November, 1917, charging that they were Chinese laborers found in the United States in violation of section 6 of the Chinese Exclusion Law of 1892 and amended in 1893, and that they had entered "without inspection by means of false and misleading statements." Hearing was had before the immigration authorities and in due course the Assistant Secretary of Labor ordered the aliens deported; the record also shows that Gin Sang Get entered the United States July 24, 1916, and Gin Sang Mo on April 28, 1917. The record shows that the aliens were examined at the time of entries and thereafter admitted to the United States as citizens thereof. The evidence given at the time of their admission tended to show that they were brothers and were the foreign-born sons of a Chinaman who had theretofore been discharged as a native of the United States by the United States Court at San Francisco. The record further shows that soon after the aliens

were admitted upon investigation it was discovered that certain employees of the Immigration Service at San Francisco had removed the original transcript of evidence concerning the alleged father's landing record. We need not state the evidence at length; suffice it to say that the immigration authorities discovered that the Chinaman had testified in 1917 that he was the father of the two aliens above mentioned, had testified in 1902 that he was not married, and had testified in 1909 that he was married and had named his children but failed to include Gim Sang Get and Gim Sang Mo. Opportunity was given to the aliens to produce the testimony of their alleged father and although it was shown that he was in San Francisco or in the vicinity of that city he did not appear. The fact that the aliens were admitted into the United States and that certificates of identity were issued to them did not foreclose the right of the immigration authorities to institute new proceedings provided they had sufficient reason to believe that the original findings had been founded upon evidence which was false and perjured and that the aliens were not lawfully within the United States. In view of the fact that certificates had been issued, the burden of attack is upon the Government, but if, as in this matter, evidence sufficient to show that the original certificates were invalid has been introduced, deportation may follow. Wong Yee Toom, 233 Fed. 194; Lin Hip Chin vs. Plummer, 238 Fed. 763.

In conclusion, the orders of the District Court quashing the writs of habeas corpus and remanding

petitioners to the custody of the immigration authorities are affirmed as to all except Lui Yee Lau. As to him the order is reversed and he is ordered discharged.

Affirmed in part and reversed in part.

[Endorsed]: Opinion. Filed July 6, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, First Division and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the orders of the said District Court quashing writs of habeas corpus and remanding petitioners to the custody of the immigration authorities in this cause be, and hereby are affirmed as to all of the said petitioners excepting Lui Yee Lau and as to the said Lui Yee Lau the order of the said District Court be, and hereby is reversed, and the said Lui Yee Lau is ordered discharged.

[Endorsed]: Decree. Filed and entered July 6, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday the seventh day of September, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3462.

NG FUNG HO, etc., et al.,

Appellants,

vs.

EDWARD WHITE, as Commissioner, etc.,

Appellee.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cause was heard, it is ORDERED that the petition, filed August 4, 1920, on behalf of appellants for a rehearing of the above-entitled cause be, and hereby is, denied.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

In re NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; GIN SANG GET and GIN SANG MO (on Habeas Corpus), Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, Appellee.

Order Staying Issuance of Mandate.

GOOD CAUSE APPEARING THEREFOR, and upon motion of Geo. A McGowan, Esq., attorney for the appellants above named, and for the purpose of enabling them to petition the Supreme Court of the United States for the issuance of a writ of *certiorari* to this court in the above-entitled matter:

IT IS HEREBY ORDERED that the mandate herein as affecting these appellants may be and the

same hereby is ordered stayed for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, Cal., Sept. 10th, 1920.

W. H. HUNT,

Judge of the Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Order Staying Issuance of Mandate. Filed September 10, 1920. F. D. Monckton, Clerk.

Service of the within order and receipt of a copy thereof is hereby admitted this 10th day of September, A. D. 1920.

FRANK M. SILVA,
U. S. Attorney,
Atty. for Appellee.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

In re NG FUNG HO. Otherwise Known as UNG KIP; NG YUEN SHEW; GIN SANG GET and GIN SANG MO (on Habeas Corpus).
Appellants.

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

Order Staying Issuance of Mandate.

GOOD CAUSE APPEARING THEREFOR, and upon motion of Geo. A. McGowan, Esq., attorney for

ppellants above named, and for the purpose of enbling them to petition the Supreme Court of the Jnited States for the issuance of a writ of *certiorari* o this court in the above-entitled matter:

IT IS HEREBY ORDERED that the mandate ierein as affecting these appellants may be and the ame hereby is ordered stayed for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, Cal., October 9th, 1920.

W. H. HUNT,

Judge of the Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Order Staying Issuance of Mandate. Filed October 8, 1920. F. D. Monckton, Clerk.

Service of the within order and receipt of a copy thereof is hereby admitted this 8th day of October, 1920.

FRANK M. SILVA,
U. S. Attorney.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

Appellants.

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Praecipe for Transcript of Record.

To the Clerk of the Said Court:

Sir: Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals) and not less than nine uncertified copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a writ of certiorari under section 240 of the Judicial Code, in the above-entitled cause, the said transcript to consist of a copy of the following:

(1) Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

(2) Order of Submission, entered May 20, 1920;

(3) Order Directing Filing of Opinion, etc., entered July 6, 1920;

(4) Opinion, filed July 6, 1920;

(5) Decree, filed and entered July 6, 1920;

(6) Order Denying Petition for Rehearing entered September 7, 1920;

(7) Order Staying Issuance of Mandate, filed September 10, 1920;

(8) Praecipe for Transcript of Record;

(9) Certificate of Clerk U. S. Circuit Court of Appeals to said Transcript.

GEO. A. McGOWAN,
Counsel for Appellants.

Service of a copy of the within praecipe is hereby admitted this 8th day of October, A. D. 1920.

FRANK M. SILVA,
Counsel for the Appellee.

[Endorsed]: Praecipe for Transcript of Record. Filed October 8, 1920. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration, at the Port of San Francisco,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-seven (67) pages, numbered from and including 1 to and including 67, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, excluding all original exhibits, made pursuant to praecipe of counsel for the appellants, filed on the 8th day of October, A. D. 1920, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 14th day of October, A. D. 1920.

[Seal] F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew; Lui Yee Lau, otherwise referred to as Louie Pon; Gim Sang Get and Gim Sang Mo, are appellants, and Edward White, as Commissioner of Immigration for the Port of San Francisco, is appellee, No. 3462, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of December, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,992. Supreme Court of the United States, October Term, 1920. No. 635. Ng Fung Ho, otherwise known as Ung Kip, et al. vs. Edward White, as Commissioner of Immigration, etc. Writ of Certiorari. No. 3462. United States Circuit Court of Appeals for the Ninth Circuit. Filed Feb. 9. 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

In the Supreme Court of the United States, October Term, 1920.

No. 635.

NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW, GIN SANG GET, and GIN SANG MO,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of record now on file in the Supreme Court of the United States shall constitute the re-

turn of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to the writ of certiorari granted therein.

February 2, 1921.

(Sgd.) JACKSON H. RALSTON,
(Sgd.) GEO. W. HOTT,
Attorneys for Petitioners.
(Sgd.) WM. L. FRIERSON,
Solicitor General.

F.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed February 9, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW, GIN YEE LAU, Otherwise Referred to as Louie Pon; Gin Sang Get, and Gin Sang Mo, Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to return to Writ of Certiorari," filed in the above entitled cause on the 9th day of February, A. D. 1921, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 10th day of February, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3462.

NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW, Ly
Yee Lau, Otherwise Referred to as Louie Pon; Gin Sang Get, and
Gin Sang Mo, Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port o
San Francisco, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of:

(1) Stipulation as to Return to Writ of Certiorari, the original of which said Stipulation was filed in said cause on the 9th day of February, A, D, 1921; and

(2) Respondents' Exhibits "A" and "C," filed March 3, 1920,

and in accordance with said stipulation, do hereby send this certified copy thereof, together with the original exhibits, to the said Supreme Court as the Return to the said Writ of Certiorari.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 10th day of February, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed:] File No. 27,992. Supreme Court U. S., October Term, 1920. Term No. 635. Ng Fung Ho, otherwise known as Ung Kip, et al., Petitioners, vs. Edward White, as Commissioner of Immigration, etc. Writ of certiorari and return. Filed February 15, 1921.

DEC 15 1921
WM. R. STANSBURY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1921

No. 176

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW, GIN SANG GET and GIN SANG MO,
(On Habeas Corpus),
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANTS.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Appellants.

GEO. A. MCGOWAN,
Of Counsel.

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In the Supreme Court
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United States

OCTOBER TERM, 1921

No. 176

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW, GIN SANG GET and GIN SANG MO,
(On Habeas Corpus),
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANTS.

Statement of the Case.

These four appellants are persons of the Chinese race who have been ordered deported out of the United States to China by the *executive* deportation procedure of the General Immigration Law for a claimed violation of the Chinese Exclusion Laws

which provide only for a *judicial* deportation hearing. There was much diversity in the holdings of the different District and Circuit Courts of Appeals upon this point, but the matter was finally determined by this honorable court in the case U. S. v. Woo Jan, 245 U. S. 552; 38 Sup. Ct. Rep. 207; that such deportations could only be brought about after a *judicial* hearing. The appellee seeks to distinguish these cases from the Woo Jan case in this particular, that the General Immigration Act here in question is the Act of Feb. 5th, 1917, which, the Government contends, so amended the earlier General Immigration Law, as to thereafter permit of the use of the *executive* deportation procedure for violations of the Chinese Exclusion Laws. That the law is amended is true, but to what extent, is the question here involved. Appellants point out, however, that this last enacted General Immigration Law only became effective on May 1st, 1917, and that they had all arrived in the United States prior thereto, all as shown by the warrants of deportation against them, and more particularly as follows:

Ng Fung Ho, at San Francisco, by ss. Manchuria, July 20, 1915;

Ng Yuen Shew, at San Francisco, by ss. Manchuria, July 20, 1915;

Gin Sang Get, at San Francisco, by ss. China, July 24, 1916; and

Gin Sang Mo., at San Francisco, by ss. Shinyo Maru, April 28, 1917,

and they have therefore called attention to and claimed the protection of Section 38 of the last mentioned act, which, they claim, holds in force the prior existing laws, that is to say, the laws as they were in force immediately prior to the 1st day of May, 1917, which places them squarely within the ruling of the Supreme Court in the Woo Jan case. This, briefly stated, is the dominant point in these cases, and as it was equally applicable to each of the four, they joined in a common petition in their own names, to be relieved of the illegal restraint. The fifth appellant below, Lui Yee Lau, otherwise known as Louie Pou, was discharged by the appellate court, and so his rights are not involved herein.

An examination of the warrants of deportation discloses that Ng Fung Ho and Ng Yuen Shew were not otherwise ordered deported. Not so, however, as to the brothers Gin Sang Get and Gin Sang Mo. They are also ordered deported for what is claimed to be a specific violation of the General Immigration Law, in that they had entered without inspection. This is a suitable ground for deportation under the General Immigration Law, provided there is any evidence to support the charge. The appellants claim that it is a make-weight charge, entirely unsupported by any evidence, and it has only been made by the Secretary by misconstruing the statute. The facts are as follows:

Gin Sang Get and Gin Sang Mo are additionally charged with having entered without inspection by means of false and misleading statements. How-

ever this may be, the *statutory* charge is that the alien entered without inspection. To this the Secretary has added the qualification, *by means of false and misleading statements.* It is admitted that these two young men were applicants for admission at a regularly designated port of entry, they arrived by steamer, they were taken to the Immigration Station, they were held pending the taking of much testimony and the conducting of a very long and painstaking examination into the claims of their right of admission, and as a result thereof they were regularly admitted into the United States upon order of the Commissioner of Immigration for this Port. They have consistently contended and maintained that the order so made was proper and that they were entitled as of right to admittance to and residence within the United States as citizens thereof, they being the foreign born sons of a native born citizen of the United States.

The petition for the writ sets forth the above facts and has attached thereto copies of the different warrants of deportation. A demurrer was interposed and the immigration records in each of the cases were admitted in evidence by mutual consent. Judge Dooling, then presiding in the lower court, overruled the demurrer and thereupon a return was filed, which set up no new matter. The case was finally submitted to Judge Rudkin, then presiding in the lower court, and his judgment was adverse to the petitioners and they accordingly perfected an

appeal. The petitioners were admitted to bail by the lower court when the petition was first presented and have since so been at liberty.

Argument.

The ten assignments of error made in this matter may be somewhat reduced by consolidating different of the points. The predominant point is common to the rights of each of the four petitioners and will be treated *first;* that is whether a person may be deported as an alien Chinese here in violation of the Chinese Exclusion Laws, by resorting only to the *executive* process contained in the last General Immigration Law, when such person had entered this country prior to the taking effect thereof; if this point is decided as contended for by appellants, there would then remain only the so-called makeweight alleged violation of the General Immigration Act itself made against two of the petitioners; therefore the *second* point is whether the statutory charge of entry without inspection made against Gin Sang Get and Gin Sang Mo is sufficiently supported by evidence, and whether that ground of deportation may be supplemented by the charge "by means of false and misleading statements", and if so, whether it is sufficiently supported by evidence. Should these points be decided adversely to petitioners there would then remain the question as to whether the respective hear-

ings accorded by the Immigration authorities were fairly conducted and their conclusions sufficiently sustained by the evidence taken therein. This final point, as it affects Gin Sang Get and Gin Sang Mo, may for brevity's sake be treated in the *second* point, thus leaving as the concluding point, the *third,* as affecting Ng Fung Ho and his son, Ng Yuen Shew, whether the hearing accorded them was fair and whether the conclusion reached was sufficiently sustained by the evidence presented.

FIRST.

The appellee claims that these four petitioners are alien Chinese persons here in violation of the Chinese Exclusion Laws, all as more particularly set forth in the various *executive* warrants of deportation. It is shown from an inspection of the *executive* warrants of deportation, that in each instance the person proceeded against had arrived at the United States prior to May 1st, 1917, which was the date the General Immigration Law of Feb. 5th, 1917, became effective, and was not proceeded against until some considerable time thereafter. Appellants contend that there was no violation of the Chinese Exclusion Laws, but that if there was, such violation must have occurred at the time of the arrival of each appellant at the United States, and such violation was therefore an "act, thing or matter" "done or existing at the time of the taking

effect" of the General Immigration Law, and could only be dealt with under the prior existing laws, which were specifically "continued in force and effect" in their original form for such purpose, which necessitated a *judicial* instead of an *executive* deportation proceeding.

The Act of Feb. 5th, 1917, concludes with Sec. 38, which is in part as follows:

> "Sec. 38. That this act, except as otherwise provided in section three, shall take effect and be enforced on and after May first, nineteen hundred and seventeen. * * *
>
> *Provided,* That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen hereof, * * *
>
> *Provided further,* That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceeding brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

As for the Chinese Exclusion Acts, it is only necessary to generally call attention to the fact that *exclusive jurisdiction to deport* Chinese persons or persons of Chinese descent is conferred upon the *judicial branch* of the government. Act of May 6, 1882, as amended by the Act of July 5, 1884, Sec-

tion 12 (22 Stat. L., 58; 23 Stat. L., 115); Act of Sept. 13, 1888, Section 13 (25 Stat. L., 476, 477); Act of May 5, 1892, Section 2, Section 3, Section 6 (27 Stat. L., 25); Act of Nov. 3, 1893, Section 6 (28 Stat. L., 7); Act of Mar. 3, 1901, Sections 1, 2, 3 (31 Stat. L., 1093); Act of April 29, 1902 (32 Stat. L., part 1, 176); Act of April 27, 1904 (33 Stat. L., 394-428). The exclusive character of this judicial deportation procedure has been upheld by the Supreme Court in the Woo Jan case mentioned in the statement of this case and need not be further referred to. This present act as affecting the Chinese Exclusion Laws, amends its predecessor by the addition of the phrase "*except as provided in section nineteen hereof*". Section 19 of the Act of Feb. 5th, 1917, designates the different classes of aliens whose presence shall be deemed objectionable and provides for the *executive* deportation procedure by the Secretary of Labor. The purpose of this amendment of the Chinese Exclusion Laws was unquestionably to at least invest concurrent if not exclusive jurisdiction upon the Secretary of Labor to exercise his *executive* deportation prerogative, and places a five year limitation after entry within which the deportation must be effected, whereas formerly there was no such limitation. The question here presented is whether this newly created power of the Secretary can have any *retroactive* effect to cover prior alleged violations of the Chinese Exclusion Laws, in view of the sweeping saving clause which concludes the act, and which ends as

follows: "*but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect*".

It will be noted that this saving clause is most sweeping, embracing matters both criminal and civil, and also whether in action or not, but the possible subject of future action, at the time of the taking effect of the act, to-wit, May 1st, 1917. To this saving clause there is one exception placed on the middle: "*except as mentioned in the third proviso of section nineteen hereof*". This third proviso is as follows:

> "*Provided further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States:"

It is at once observed that this sole exception to the saving clause contained in Section 38 has *plural* exceptions to its own scope of action. What are these exceptions? They must be first ascertained so that they may be withdrawn, for only in that way may be known the extent of the limitation on the saving clause contained in Section 38. An analysis of Section 19 discloses that it enumerates the various classes of aliens whose faults or misfortunes, as the case may be, renders their future residence in this country objectionable, and according to the gravity thereof sets the time within which they may be deported, and it finally places them in three

groups: the first of which we will call the *mild* offenders, may be deported within *three years after entry,* the second of which we will call the medium offenders, may be deported within *five years after entry,* while as to those remaining and who constitute the third group, which we will call the extreme offenders, they may be deported *at any time after entry.* We therefore contend that the "*exceptions hereinbefore noted*" must of necessity be the three and the five year groups, the mild and medium offenders, which form the exceptions referred to in the third proviso of Section 19. This solution is not only reasonable and consistent, but is entirely in keeping with the grading of the offenders according to the gravity of their offending. Accordingly we observe from Section 19 that those who enter in "violation of any other law of the United States", which undoubtedly refers to the former immigration acts held in force by the saving clause hereinafter adverted to (see Ex parte Durrand, 160 Fed. 558), and may or may not be intended to include the Chinese Exclusion Laws, may be deported "at any time within five years after entry", and are therefore without the third proviso of Section 19, and hence are not affected by the withdrawing proviso contained in the saving clause in Section 38. In other words, as to the mild and medium offenders against the General Immigration Law, or the other laws of the United States brought thereunder, the prior existing laws were held in force as to such "prosecutions, suits, actions, proceedings, acts,

things, or matters". As to the third group, that is to say, the extreme offenders, they are withdrawn from the protection of the saving clause in Section 38, and may be deported "irrespective of the time of their entry into the United States". Adopting this view of the matter, these appellants having been charged by the Secretary of Labor with having entered the United States in violation of the Chinese Exclusion Law, such offense, if committed at all, was complete and was "an act, thing or matter" "done or existing at the time of the taking effect" of the last General Immigration Law, May 1st, 1917, and they could accordingly only be prosecuted therefor under the prior existing laws which were continued in force for such purpose. Woo Jan v. U. S., supra, which necessitates a judicial proceeding. Whether the Secretary has even yet any jurisdiction over Chinese charged with a violation of the Chinese Exclusion Acts may well be questioned.

The exact point here raised was before the Circuit Court of Appeals for the Fifth Circuit in the case of Mayo, Immigration Com'r, v. United States, 251 Fed. 275. It is disclosed by the transcript of the record in that particular case that there, as originally here, there were five Chinese persons arrested upon the Secretary's executive warrants. The trial court discharged them from custody. The government appealed all of the cases and stipulated that the four remaining cases might follow the decision to be

rendered in the first case which is the one mentioned above. The court there held as follows:

> "It is difficult to determine just what is meant by the third provision of section 19; the exception to the last proviso of section 38 is not more clear. To give to the latter the meaning suggested by the government would be to permit the exception to substantially (if not absolutely) destroy the proviso. It may be possible to ascribe a meaning to each clause which would give effect to both. If the third proviso of section 19 be held to make that section applicable to all aliens, without reference to the time of their entry, who do, after the passage of the act, something denounced by the act, and if the last proviso of section 38 be held to preserve the status existing at the time of the passage of the act as to all aliens who commit no new offense thereafter, consistency and effect would be given to all the language under consideration. Under this view the 'things and matters' 'as they existed' with relation to the relator 'at the time of the taking effect of the act'—that is, his status as an alien in the country in violation of the Chinese Exclusion Law—will be dealt with by the law as it was before the passage of the act."

There is but one point in the case at bar in which it differs from the case just cited. The right of the alien (Lee Wong Hin) in the Mayo case to reside in the United States was *in action* at the time of the taking effect of the General Immigration Law, whereas with respect to these appellants, if they had violated the Chinese Exclusion Law in their entry or re-entry into the United States, such violation was then and there an "act, thing or matter, civil or criminal, done or existing at the time of the

taking effect" of the last General Immigration Law, though *not then in action*. This difference, however, does not affect the legal status of the case, this for the reason that the saving clause in Section 38 is unusual, by reason of including acts, things and matters not in suit or action; but we submit, the very fact that such acts, things and matters are specifically named shows an unmistakable intent upon the part of Congress to save the prior acts as to them, as well as to the acts, things and matters on suit or action.

Ex parte Durand, 160 Fed. 558, supra.

It is felt that there would have been more certainty in the expression of the opinion of the court in Mayo v. U. S., supra, had the industry of counsel directed the attention of the court to prior legislation and the judicial construction thereof. Thus the prior Immigration Act, that of Feb. 20th, 1907, contains in Section 28 almost exactly the same saving clause. This act is construed in Botis v. Davis, 173 Fed. 996, and it is there held on page 999 as follows (after setting forth Section 28):

> "The Act of 1907, therefore, is wholly prospective in its operation. The language used in the quoted section could hardly be made more comprehensive or explicit. All acts, things, and matters done or existing when the statute took effect are governed by earlier laws. The date of taking effect was July 1st, 1907, several months after Botis landed. So there can be no question that the Act of 1907 has no bearing or effect on Botis' status, which is governed entirely by pre-existing laws. * * *"

In viewing this same act, that of 1907, the Circuit Court of Appeals for the Seventh Circuit, in the case of Davies v. Manolis, 179 Fed. 818, clearly support this view, holding that the alien having entered the country in August, 1906, long prior to the enactment of the Act of Feb. 20th, 1907, he could not be deported thereunder. If he had violated a prior immigration act he must be specifically charged thereunder and given a hearing under the then existing law.

Pressing the research further, we find that the next earlier immigration act was that of March 3, 1903 (32 Stat. L., 1220), wherein Section 28, though differently worded, covered the same legislative intent as expressed in Section 28 of the Act of Feb. 20th, 1907, and Section 38 of the Act of Feb. 5th, 1917. This legislation was construed by the Circuit Court of Appeals for the Seventh Circuit, in the case of Lang v. U. S., 133 Fed. 201. The court there held:

> "* * * No prosecution could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was, that no prosecution begun under that statute, whether they were then pending or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the government upon this class of importations. It is to carry out this purpose that the word 'begun' is employed, merely as a connective to identify a prosecution pending or to be brought, with the statute under which it is brought."

See also the concurring opinion of Jenkins, Circuit Judge.

It is further submitted that the legislative intent here manifested is reflected from earlier enactments, notably Rev. St., Section 13 (U. S. Comp. St. 1901, p. 6), enacted in 1871, and commented upon in Judge Jenkins' concurring opinion. It finds a more recent expression in Section 299 of the Judicial Code.

In the case of Russomanno, 128 Fed. 528, the Circuit Court, Lacombe, Circuit Judge, held:

> "The authority to deport this alien is to be found in the Act of 1891 (Act March 3, 1891, c. 551, sec. 11, 26 Stat. 1086 (U. S. Comp. St. 1901, p. 1299)), not in the Act of 1903. Inasmuch as he was not seized, even, for purposes of deportation, until more than a year had elapsed after his last entry into the United States, the time within which he could be taken into custody under the Act of 1891 had fully expired.
>
> The prisoner is discharged."

In the opinion filed in this case by Judge Rudkin, wherein he sets forth the reasons which impelled him to dissent from the opinion of the Circuit Court of Appeals for the Fifth Circuit in Mayo v. U. S., supra, he in part adopts our reasoning wherein he holds:

> "But there is excepted from this general saving clause the cases mentioned in the third proviso to section 19, and that proviso is expressly made applicable to all classes of aliens, irrespective of the time of their entry into this

case of Lapina v. Williams, 232 U. S. 78; 34 Sup. Ct. Rep. 196, by the holding that the acts applied to aliens, whether returning to a previously acquired domicile or as immigrants. This decision was rendered Jan. 5th, 1914, and comments at length upon the earlier conflict of judicial opinions and the importance of the point. When we consider that this present act is mainly a recodification of the prior existing immigration legislation, it is all the more apparent that Congress would want to make it very plain that while the wording of the act may have been changed, there was to be no change as to whether the legislation applied to domiciled aliens or not and whether domicile could be asserted to defeat deportation. For this reason, we submit, this third proviso of Section 19 was inserted. How complete it is for the purpose is most obvious. Note the language—the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States. Congress here gave protection the right of domicile when over three years, for the mild offenses; when over five years for the medium offenses, and no such protection, no matter how long the domicile, for the more serious offenses. When we take this view of the matter it is at once apparent why this proviso was inserted in the saving clause contained in Section 38. Congress did not intend that the more serious offenders, that is, the moral degenerates, the outcasts, the enemies of civilized peoples and organized governments, should

ever be heard to assert the right of domicile to defeat an effort to deport them out of the country. We assert that this, in our opinion, is exactly what Congress intended to and what it in fact did do.

This creates no hiatus in the enforcement of the law. On the contrary, it holds in force the law which has been violated for the express purpose of the prosecution, either criminal or civil, of all transgressions against it. Thus a person who has offended against the prior Immigration Act may be arrested and charged with such violation and made to answer thereto, the earlier act being held in force for that purpose. A person who has offended against the Chinese Exclusion Laws prior to the amendment thereof as contained in the last Immigration Law, may be arrested and charged with such violation as provided in the Chinese Exclusion Laws, which necessitates a *judicial* hearing all as held by the Supreme Court in the Woo Jan case. To deport under the present Immigration Law for a violation of a prior Immigration Law matters little to such a defendant, the procedure of deportation being the same under both the old and the new Immigration Laws, always provided, of course, that it is made clear to the defendant what law he is charged with having violated. This does not hold good, however, when the violation complained of is of the Chinese Exclusion Laws prior to May 1st, 1917, for as to such violation the judiciary, under those laws as then existing, has exclusive jurisdiction, if, indeed, it has not now in all such cases.

Another point to be made in connection with these cases is that the first two of them arose within the Fifth Circuit, where the decision of the appellate court of the circuit in Mayo v. U. S., supra, is supposed to be the prevailing law. The government accepted that decision. They did not ask either a rehearing or for *certiorari*. In spite of this we find the Immigration Department, even in cases which arose within that circuit, in effect ignoring the decision in a like case in which they were a party. The case was decided in the lower court July 24, 1917, which was prior to the issuance of any of the warrants of arrest in these cases. In attempting to override or ignore that decision they should be held to abide their election, and their jurisdiction failing, an order of absolute discharge should be made herein. That was even then the order on July 24, 1917. The decision of the Circuit Court of Appeals in Mayo v. U. S., supra, was rendered on April 12, 1918. Having invoked that appellate jurisdiction, and having accepted that decision without either asking a rehearing or *certiorari*, it is felt that in their practice within that district and circuit at least they should be guided by it.

The Court of Appeals in its decision herein holds that the last General Immigration Act, that of February 5, 1917, is retroactive in this that it permits of the trial and deportation by *executive process* of Chinese found in this country in violation of the Chinese Exclusion Acts, irrespective of whether

their entry had preceded the taking effect of the last General Immigration Act or not. This in its effect partially circumvents the decision of the Supreme Court in the Woo Jan case (245 U. S. 552) wherein it was held that Chinese persons could not be so deported, but if removed at all it should be by *judicial process.*

After the submission of this case to the Court of Appeals the Supreme Court had occasion to advert to the decision in the Woo Jan case in a way and manner which leads us towards the conclusion that this august tribunal does not regard that decision as having been so circumvented in the actual operation of the Chinese Exclusion Acts. The case referred to is that of White v. Chin Fong, 253 U. S. 90; 40 Sup. Ct. 449, decided on May 17, 1920. There is another thought that tends to confirm this view. The Woo Jan case was decided by the Supreme Court almost one year after the Immigration Act of February 5, 1917, was adopted. It is quite probable that this last mentioned act, being then prevailing law, was a present and operative factor in the mind of the court when, in concluding its decision in that case, it held:

> "This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act. They are addressed under treaty stipulations to laborers only. Other classes are not included in their limitation and it was provided by treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed differ-

> ent from any under the Immigration Act, and the Exclusion Laws are adapted to them and their procedure is hence saved by Section 43."

In the recent case of White v. Chin Fong, supra, the Supreme Court speaks in this manner of the Woo Jan case:

> "In the case of United States v. Woo Jan, 245 U. S. 552, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who had been in the United States and has departed from it with the intention of returning is entitled under existing legislation to have his right to do so judicially investigated with 'its assurances and sanctions', as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action."

As affecting the present litigation we are confronted with the fact that Ng Fung Ho, a returning merchant with an investigated status as a merchant, would be entitled to a judicial determination of his right to re-enter, had that right been withheld. Can it by any parity of reasoning be held that his rights are any less because of his regular entry upon the order of the commissioner? Can he be deported by a less formal proceeding than he is entitled to in asserting his right of entry? We think not. Ng Yuen Shew was landed upon appeal by the secretary as his son. As to Gin Sang Get and Ging Sang

Mo, they are citizens, but their rights as such cannot be less than that of the alien merchant as has been held by the lower Court of Appeals in Tsoi Sim v. U. S., 116 Fed. 920, 925. All of these four appellants were regularly admitted into the United States by the appropriate immigration officials after due examination and determination of their respective rights of admission, and long after the consummation thereof. The action of the secretary is clearly against the explicit language of the Chinese Exclusion Law which requires a *judicial hearing and determination.* The conclusion of the decision in White v. Chin Fong, supra, is as follows:

> "The Government appeals against the explicit words of the provision of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese, or if they fraudulently enter, to expel them, and, it is insisted, that it would be a perfunctory execution of the purpose to let one in who may be immediately put out again. That intention, it is urged, should not be ascribed to the laws, and in emphasis, it is said, 'such a legislative absurdity is unthinkable'. But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this court has declared, and in the present case the right that had been adjudged and had been exercised in reliance upon the adjudication."

SECOND.

The second point affects Gin Sang Get and Gin Sang Mo, brothers, who are the foreign-born sons

of a native-born citizen of the United States, and hence are themselves citizens of the United States. It is whether the statutory charge under the General Immigration Law that "He entered without inspection, by means of false and misleading statements" and the charge under the Chinese Exclusion Law with "being a Chinese laborer not in possession of a certificate of residence", which is separately made as to each of the brothers, are sufficiently supported by evidence and whether the charges as claimed fall within the respective statutes.

By referring to the warrants of deportation as to these brothers, we find that it is charged that the first, Gin Sang Get entered on the 24th of July, 1916, and the second, Gin Sang Mo, entered on April 28th, 1917. In each instance it is disclosed that the appellants arrived at a regularly designated port of entry for Chinese and immigration purposes upon regular passenger steamers, that they were duly taken to the immigration station and after a protracted examination of witnesses and examination of prior immigration records, and making of reports by the government's investigative officers, these boys were ordered admitted into the United States as citizens thereof by the Commissioner of Immigration for the Port of San Francisco, thereafter applying for and receiving their certificates of identity. Here was no entry without inspection. On the contrary, here was an entry after a most rigid and protracted examination made upon the order of the Commissioner of Immigra-

tion. But the Secretary states "by means of false and misleading statements", thus by a latitudinarian construction of the statute adding something to it which changes absolutely its meaning. Has the Secretary of Labor power to take the statutory ground of deportation "who enters without inspection" and add the qualifying and contradictory phrase "by means of false and misleading statements" and so completely change the charge as to make it a flat contradiction of the congressional will? The extraordinary power which Congress (Section 19, last Immigration Act) gave the Secretary was to reach the cases of

> "any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection."

These appellants have not violated these statutory provisions but on the contrary have complied with them. They entered at a duly designated port of entry, at a time and place where they were received, inspected and examined by the immigration officials, they were taken to the Angel Island Immigration Station and held and examined, their cases were reported upon, considered at length, and thereafter they were duly landed by order of the immigration officials. The records in each of their cases show this. The extraordinary power which

Congress gave the Secretary was to reach the cases of those who evaded inspection, examination and compliance with the order disposing of their cases. When this charge is established it means deportation, irrespective of the fact that the person might have been admissible into the United States, had he submitted his claims to the immigration officials and been content to abide their decision. Congress did not extend it to those who had complied with all of the forms and procedure exacted by the statute. Certainly this is an attempted amendment to the law, not an interpretation of it. To enter without inspection has a clear cut, well defined meaning which leaves no room for doubt in the mind of a person as to the issue he has to meet, which is what Congress intended it should be, simple and direct, with no chance of a misunderstanding. To enter without inspection, *by means of false and misleading statements,* is in itself a violent contradiction. Not only this, but it is manifestly vague and ambiguous, affording the person charged no adequate information of what he has to meet. It is without the authority of the statute and therefore lacks binding force and effect. It is not "within the authority of the statute" which is one of the essential prerequisites as held in Low Wah Suey v. Backus, 225 U. S. 460, by this honorable court, and further commented upon in Gegiow v. Uhl, 239 U. S. 31. In the case of Howe v. U. S. 247 Fed. 292, the same charge of entry without inspection, to which must have been added the qualification

here complained of, was involved, and there as here it was shown that the person had entered after inspection and a submission of his claims of admission to the immigration authorities, upon whose order he was admitted. The appellate court there said as to this charge:

> "There seems to us to be no ground whatever for saying that he entered in violation of law."

This entry without inspection charge was formerly considered by Judge Dooling in the case of Wong Tuey Hing, 213 Fed. 112, to which the attention of the court is most respectfully invited. The court said:

> "If he entered without inspection, as the warrant of deportation recites, it was because the immigration officials did not desire to inspect him, not because he prevented them from so doing",

and after calling attention to Rule 3 of the Chinese Regulations:

> "It is evident therefore that, if the immigration officers failed to inquire into petitioner's status as an alien as distinguished from his status as a Chinese alien, they did so in violation of this rule, and cannot now hold petitioner responsible therefor. He complied with every requirement of the law to establish his status as a Chinese entitled to depart from and return to this country. If that status is to be inquired into again a year after his re-entry into the country, it should be inquired into under the exclusion laws and not under the immigration act."

In the case of General Castro (203 Fed. 155), reported as U. S. v. Williams, it is held:

> "Aliens have the right to enter the United States except so far as the right is restricted by our statutes. * * * The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected."

In Redfern v. Halpert, 186 Fed. 150, the appellate court for the Fifth Circuit held with approval:

> "The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed."

We submit that there is nothing to support the contention that these young men entered the United State in violation of that part of the Immigration Law which prohibits entry without inspection.

The contention of the government that they could so interpret the statute by regulation must fall to the ground. It is against all of the cases upon that point. Morril v. Jones, 106 U. S. 466, it is held:

> "In our opinion, the object of the secretary could only be accomplished by an amendment to the law. That is not the office of a treasury regulation."

See also U. S. v. George, 228 U. S. 14, where the court, through Mr. Justice McKenna, said:

> "If the Secretary of the Interior may add by regulation one condition, may he not add an-

> other? If he may require a witness or witnesses in addition to what section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department?"

In the case of U. S. v. United Verde Copper Co., 196 U. S. 207, the court, speaking again through Mr. Justice McKenna, said:

> "If rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

We submit that vast powers are given the immigration officials in the legislation under consideration. Those powers are so almost unlimited in their scope that we are struck with wonder that any attempt should be made to enlarge upon them by indulging in such dubious construction. Certainly there must be a limit somewhere and the court is most respectfully called upon to define it. We feel that this alleged violation of the Immigration Law is nothing but a makeweight charge thrown in against these appellants in a vain endeavor to bring these cases within their executive jurisdiction, the department knowing before it had issued its warrants of deportation that the Circuit Court of Appeals for the Fifth Circuit had already held that the Secretary was without jurisdiction where the Chinese Exclusion Law alone was involved.

Turning our attention now to the case of these two boys upon the merits, we find that whether examined under the one law or the other that their claim of American citizenship should have been recognized. The additional safeguards of a judicial hearing with all the sanctity of its procedure and the impartiality of its hearing and ultimate judgment (as set forth in Woo Jan's case), would have given these appellants a more fair and adequate opportunity to present their defense. Even so and considering the limitations which the executive character of the hearing placed them under, we feel that their case of American citizenship was fully and fairly made out when they were applicants for admission into the United States, all as shown by the records in the admission cases of each thereof. After being duly admitted into the United States they had issued to them their respective Certificates of Identity, and this attempt of the immigration officials to now retry that issue and determine it adversely upon suspicion and conjecture should not be encouraged. There is a growing tendency in the decisions of the courts to hold these immigration decisions in favor of admission, and the Certificates of Identity issued under departmental regulation for the future protection of such formes applicants for admission, as entitled to the recognition of the courts as establishing a prima facie right of residence, in the absence of a satisfactory showing of error. See the case of Liu Hop Fong v U. S., 209 U. S. 453, where this court said "certainly

the certificate ought to be entitled to some weight". In the case of U. S. v. Hom Lim, 214 Fed. 456, at 463 the court said:

> "The decision of his right to enter was presumptively correct, and unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient."

In Ex parte Wong Yee Toon, 227 Fed. 247, at 251 the court said:

> "Such a certificate imports at least prima facie verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect."

And in the same case upon appeal to the Circuit Court of Appeals, Wong Yee Toon v. Stump, 233 Fed. 194, at 196 the court said:

> "After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted."

In the case of Lui Hip Chin v. Plummer, 238 Fed. 763, supra, the lower appellate court held:

> "But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained."

Attention is also directed to the recent case of Lum You, 262 Fed. 451, wherein Judge Dooling held as follows:

"The record shows that petitioner was admitted to this country in January, 1910, as the son of a native born citizen of this country. He was about 12 years old. In 1916 he returned to China without a preinvestigation of his status, because of the serious illness of his mother in China, whom he desired to see, did not afford him time for such preinvestigation. Returning in March, 1919, he was denied admission because of certain discrepancies between his testimony and that of his alleged father and because of other discrepancies in the testimony of the father given at different times in regard to the conditions in the home village. None of these latter seem to bear at all upon the question of relationship, which is the only question in dispute.

The rights of one whose status as an American citizen has already been determined, who has lived a number of years in this country without question, should be, it seems to me, more stable than to be overturned by the evidence in the present case much of it having nothing at all to do with the question at issue. I do not mean that a first, or second, or third adjudication of status by the Department is final, or that it may not later be set aside, but I do mean that there should be some substantial reason for so doing. To my mind such does not appear in the present case."

Attention is also directed to the case of Chan Wy Sheung, 262 Fed. 221, wherein it is held:

"I am fully aware of the limited power of the court in matters of this kind and of the force and effect that must be given to the findings of the department, but I am of the opinion that the question here presented is one of law rather than of fact and I cannot sanction the injustice that would result from excluding the

> applicant from the country at this late day under the circumstances disclosed by this record. The decisions of the department after a full hearing should be given some effect and should not be overturned or set aside in subsequent cases upon any such pretext or for any such reasons as are here assigned."

This point is submitted upon the immigration record in the admission case and as supplemented by the record in the deportation proceeding. We feel that the burden of the government, under the Immigration Law and the decisions here quoted, of showing some real substantial evidence to support them in attempting, at this late date and in this disadvantageous kind and class of a hearing, to set aside the former finding of American citizenship of these two appellants by the appellee herein, has been a failure, no such evidence being disclosed. These two appellants were originally admitted into this country as citizens thereof by order of the appellee herein after a most protracted examination of many witnesses, inspection of records, reports of inspectors and so on. Their landing was proper. They were given certificates of identity as evidence of their lawful residence as citizens within this country. They have consistently maintained the lawfulness of their residence here and are within the protection of our constitutional guaranties, mentioned in General Castro's case (203 Fed. 155), and it is most respectfully submitted that they are entitled to be relieved of the restraint imposed by the warrant of the Secretary. See the recent case

of U. S. v. Low Hong, 261 Fed. 73, by the Circuit Court of Appeals for the Fifth Circuit wherein the determination of American citizenship was not held to be dependent upon the investigation and determination thereof by the Secretary.

In Moy Suey (147 Fed. 697) the appellate court for the Seventh Circuit held as follows:

> "But when a person, physically and politically present in the United States at the time he is arrested for deportation, claims that he is an American born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported is banished, and banishment is a punishment that can follow only a judicial determination in due process of law."

In Gee Cue Beng v. United States (184 Fed. 383) the Circuit Court of Appeals for the Fifth Circuit copies verbatim a large portion of the Moy Suey decision and adopts it as their own.

In Pang Sho Yin v. United States (154 Fed. 660) Circuit Court of Appeals for the Sixth Circuit, enunciate the same principles and conclude:

> "The identification of the appellant by the witness as the child of their acquaintance in San Francisco is so positive that we cannot feel

> justified in disregarding it when the consequences are so serious as the possible (and we think probable) expulsion from his native country of one who is entitled to share the birthright of citizenship."

With profit also might be perused a very able decision of District Judge Newman in United States v. Charlie Dart (251 Fed. 394), and the opinion of the same judge in United States v. Jhu Why, reported in 175 Fed. 630.

There is a still more recently decided case by this court, that of Kwock Jan Fat v. White, 253 U. S. 454; 40 Sup. Ct. 566, decided June 7, 1920. In that case, which was of a native-born American citizen of the Chinese race seeking readmission, the court held:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country",

and concluded as follows:

> "The practice indicated in Chin Yow v. United States, 208 U. S. 8, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits."

These two decisions comprise what might be termed *the last word,* from this Honorable Court upon the subjects involved. We feel that they cannot but have a beneficial effect upon the rights of these appellants and that they are a sufficient warrant for the according of a judicial hearing for the

final determination of the continued right of resi
dence of all four of these petitioners and the con
tinuation of the right of citizenship of the las
two of appellants.

THIRD.

This, the final point in the case, affects the firs
two of the appellants, Ng Fung Ho and his son
Ng Yuen Shew whether the hearing accorded them
was fair and whether the conclusion reached wa
sufficiently sustained by the evidence contained in
the record.

Ng Fung Ho was readmitted into the United
States as a Chinese merchant returning to hi
previously acquired domicile. He presented th
evidence required by the statute in such case
exacted and was readmitted. The evidence of th
then minority and the existence of the relationshi
of father and son between Ng Fung Ho and Ng
Yuen Shew was then and there established and i
still conceded to be correct. The status of the son
Ng Yuen Shew is held to be entirely dependent upon
the status of the father, Ng Fung Ho, his right o
continued residence standing or falling with his.

Upon this point these appellants are alien Chinese
entitled under the Chinese Exclusion Law to a judi
cial hearing to test the legality of their continued
right of residence. They entered this country almos
two years before the present General Immigration
Act became effective. The son was landed by orde

of the Secretary of Labor, and in reaching that order the lawfulness of the domicile of the father was recognized. For the period of almost two years after their admission, had their right of residence been assailed, it could only have been done by a judicial proceeding. That was a valuable right attached to their right of residence in this country (Woo Jan's case, supra). To attempt to now deport them without such judicial hearing is to deprive them of a fair opportunity to safeguard their right of residence in this country. They presented the evidence exacted by the statute, by the kind of witnesses exacted therein, and it was determined by the officials whose duty it was to pass upon the facts, and they were and are therefore entitled to residence in this country. Chin Fong v. White, 258 Fed. 849; White v. Chin Fong, 253 U. S. 90; 40 Sup. Ct. 449, supra. They were issued Certificates of Identity and, under the line of authorities set forth in the two preceding points, these were not to be ignored. They were presumptively correctly admitted. We feel that full justice to these two appellants may only be accorded them by a judicial hearing.

These cases are finally submitted as to each of the three points involved. Attention is again called to the statement thereof. If the first point is sustained in favor of appellants, there would still remain the second point as solely affecting the alleged specific violation of the General Immigration Law. Should the first point be decided adversely to the appellants,

there would yet remain the second and third points, the sustaining of any of which would mean the release of the appellant or appellants whose rights are therein affected, irrespective of the adverse finding upon the jurisdictional feature involved in the first point. We feel that any final judgment in favor of any or all of the appellants should be that of an absolute discharge.

Dated, San Francisco,
December 7, 1921.

Respectfully submitted,

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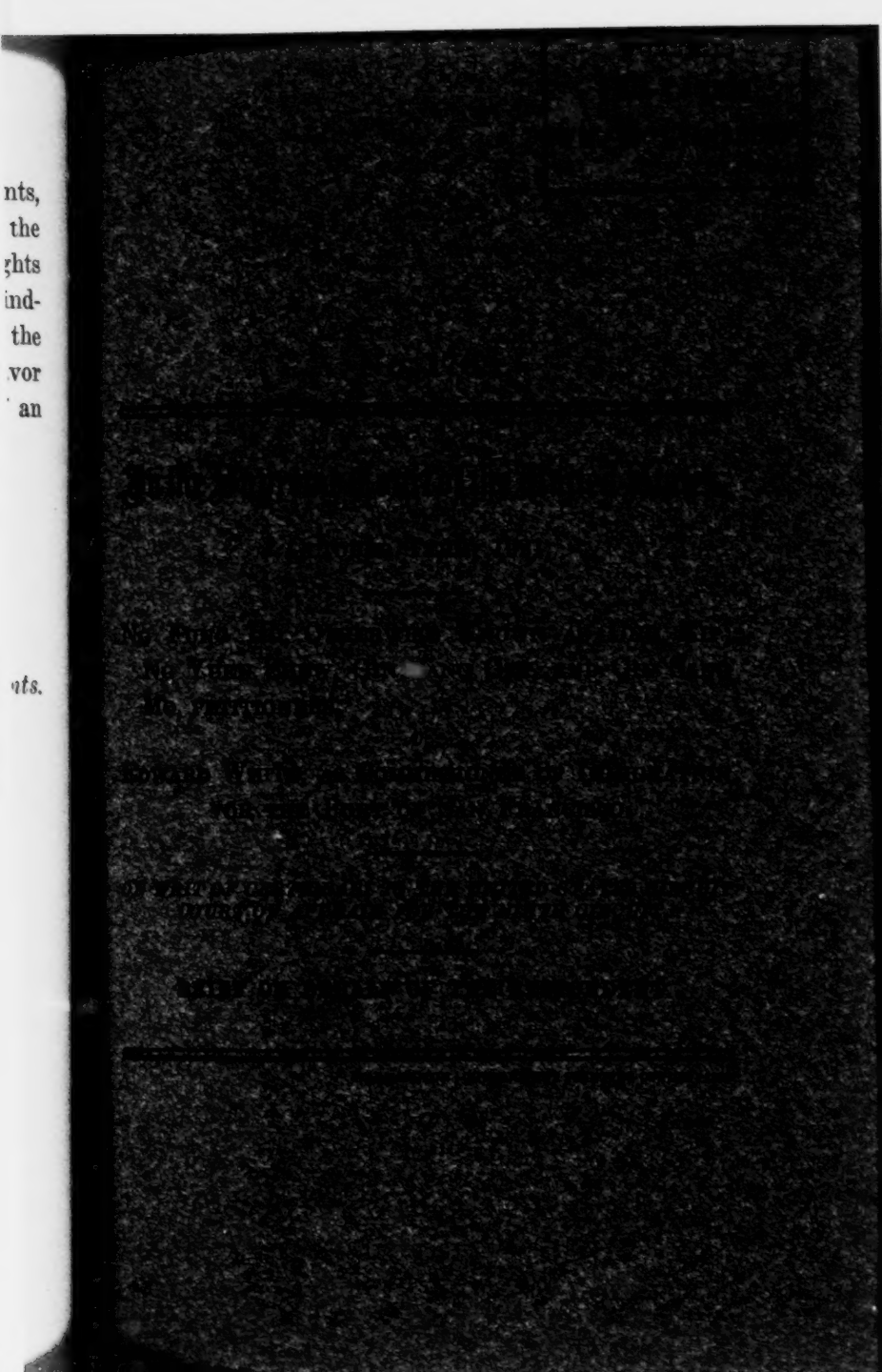

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

NG FUNG HO, OTHERWISE KNOWN AS Ung Kip; Ng Yuen Shew, Gin Sang Get, and Gin Sang Mo, petitioners,
v.
EDWARD WHITE, AS COMMISSIONER OF Immigration for the Port of San Francisco.
} No. 176.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE RESPONDENT.

I.

Assuming that the procedure prescribed by the general immigration act of February 5, 1917, c. 29, may be applied in any case involving the expulsion of Chinese persons already in this country, it is not necessary to give it a retroactive effect in order to sustain the deportations in the cases at bar, since the ground of said deportations was not the unlawful entries of the appellants, but their unlawful remaining.

(*a*) It is respectfully submitted that the case at bar was decided by the two lower courts, and is argued in the brief in this court on behalf of appellants

on an entirely wrong theory—that is, a theory not arising on the facts of the case as stated in the record, viz, that, in order to maintain the validity of the arrest and deportation of appellants, it is necessary to give a retroactive effect to section 19 of the general immigration act of February 5, 1917, c. 29, 39, Stat. 889, because the said arrest and deportation of appellants were for an unlawful entry into this country, which entry admittedly took place, in the case of all the appellants, prior to May 1, 1917, the effective date of the act of February 5, 1917, c. 29. This theory of the case, however, quite overlooks the fact that the warrants of arrest and deportation in the cases of appellants were not based at all on an unlawful entry. The warrants of deportation are set out in the petition for the writ of habeas corpus (R. 2–13), and, as they are all alike as respects the ground of deportation, that of Ng Fung Ho (R. 4, 5) will be taken as the type. The charge against Ho, on which the right to arrest and deport him was solely based, was "that *he has been found* within the United States in violation of section 6, Chinese exclusion act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence."

The warrant of arrest in Ho's case was dated September 20, 1917; in Shew's case on the same date; in Get and in Mo's cases on November 12, 1917.

(*b*) It thus appears from the record that the right to deport appellants was asserted, not on account of

something done by them prior to the going into effect of the act of February 5, 1917, c. 29, viz., an unlawful entry prior to May 1, 1917, but on account of their having been found in this country after May 1, 1917, in violation of a special act of May 5, 1892, c. 60, which dealt only with the act of unlawfully remaining in this country irrespective of the lawfulness or unlawfulness of the original entry.

(*c*) There can not be any doubt that the unlawful entry of an alien into the United States, and the unlawful remaining of such alien after entry, are, both in their nature and by explicit statutory provisions, entirely distinct. An alien may enter this country unlawfully and yet be entitled to remain, as where, by treaty or act of Congress ratified or approved subsequent to his entry, the class to which he belongs is withdrawn from the excluded classes. Conversely, an alien may enter the United States lawfully and yet be subject subsequently to deportation, owing to a change in the law, and this is the very case (as will be shown later) with the act of May 5, 1892, c. 60, on which the deportation proceedings in the case at bar were based. This distinction between an unlawful entry and an unlawful remaining, founded in the nature of things, has been adopted by the Chinese exclusion acts practically from the beginning. For example, section 1 of the act of May 6, 1882, c. 126, 22 Stat. 58, provided that the coming of Chinese laborers to the United States should be suspended and that during such suspension it should not be lawful for any Chinese laborer

to come to this country, or, "*having so come, to remain within the United States,*" thus in the most distinct language providing not merely for the unlawful entry of Chinese laborers, but also for their unlawful remaining. It is true that, in so far as respects section 1 of the act of May 6, 1882, c. 126 (although not as respects section 6 of the act of May 5, 1892, c. 160, on which the present proceedings were based), the two offenses are connected, so that there could not be an unlawful remaining unless there had been an unlawful entry. Nevertheless the two grounds, one of exclusion and the other of expulsion, are distinct things and are distinguished throughout the act. For example, section 6 of the act provided for certificates of identity as the badge of the non-excluded classes. Section 12 (after dealing with an unlawful entry) provided that "any Chinese person *found unlawfully* within the United States" should be caused to be deported. How would it be determined whether a Chinese person was "found unlawfully within the United States" or not? In so far as the Chinese person was concerned, solely by the production of the certificate of identity which, by the provisions of section 6, must be, *at any time after entry*, "produced to the proper authorities of the United States whenever lawfully demanded." While, therefore, the unlawful remaining is, under the act of May 6, 1882, c. 126, dependent on the unlawful entry, yet it is a distinct ground for deportation, with clearly separated procedural provisions.

(*d*) When the special act of May 5, 1892, c. 60, 27 Stat. 25 (on which the deportation proceedings in the present case were based), is examined, it will be perceived that the material portions of this act do not deal with the entry of Chinese persons at all, but only with their being or remaining in the United States. This statute was carefully analyzed and its constitutionality sustained in *Fang Yue Ting* v. *United States* 149 U. S. 698. It was said in the opinion in that case that the act "deals with two classes of Chinese persons, first, those 'not lawfully entitled to be or remain in the United States,' and second, those 'entitled to remain in the United States.' These words of description neither confer nor take away any right, but simply designate the Chinese persons who were not, or who were, authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of the act, but subject, nevertheless, to the power of the United States, absolutely or conditionally, to withdraw the permission and to terminate the authority to remain." The court then went on to point out that the said act of May 5, 1892 c. 60, took the class of Chinese laborers who were entitled to remain in the United States and, by section 6 (the relevant section to the case at bar), imposed upon it the condition of the procurement from the proper officials of a certificate of residence without which the members of said class ceased to be lawfully, and became unlawfully, within the United States, and subject to deportation on that ground. One of the Chinese persons before this court

in the Fang Yue Ting case had come to this country in 1879 and had ever since resided here (149 U. S. 702(, so that he had entered this country lawfully and was, up to the passage of the act of May 5, 1892 c. 60, entitled to remain here. Yet an order of deportation against him was sustained (149 U. S. 731), because he did not have the certificate of residence prescribed by the act. In its opinion, the court made the following statements:

> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.
>
> The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. * * *
>
> * * * it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of Congress, any right, as a denizen or otherwise, to be and remain in this country, except by the license, permission, and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it. * * *
>
> Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the Government of

the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps toward becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

For the reasons stated in the earlier part of this opinion, Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer, found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But Congress has not undertaken to do this.

The effect of the provisions of section 6 of the act of 1892 is that, if a Chinese laborer, after the opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States, that an officer of the customs, or a collector of internal revenue, or a marshal, or a deputy of either, may arrest him, not with a view to imprisonment or

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> punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination of the only facts which, under the act of Congress, can have a material bearing upon the question whether he shall be sent out of the country or be permitted to remain.

Mr. Justice Field, who was thoroughly familiar with the Chinese exclusion laws, dissented on the express ground that the power to expel after entry was so different from the power to exclude as to require the application of different principles, but this court, while admitting that exclusion and expulsion were two distinct things, denied that different principles of constitutional law applied to them. The same answer was made to the same claim in *Wong Wing* v. *United States* 163 U. S. 228, 231; and in *Li Sing* v. *United States* 180 U. S. 486, 488, 490, it was held that a favorable ruling by the proper authority as to the right of a Chinese person to enter this country was not *res adjudicata* as to his right to remain. In *Ah How* v. *United States* 193 U. S. 65, 77, the case of Fong Yue Ting was followed, and the ground of deportation was recognized as unlawful remaining, not unlawful entry. In the case of *White* v. *Chin Fang* 253 U. S. 90, 92, the court said:

> In the case of *United States* v. *Woo Jan* 245 U. S. we had occasion to consider the difference between the situation of a Chinese person in the United States and one seeking

to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to Executive action and decision.

In these very recent cases, therefore, as in prior cases, the court recognized the distinction, as a ground for deportation of an alien, between unlawful entry and unlawful remaining even where the latter was dependent on the former.

(*e*) When analyzed, the distinction between an unlawful entry and an unlawful remaining is found to be the distinction between an act and a state, between a thing done once for all, and a relationship extending over a period of time, as in the case of committing, as distinguished from maintaining, a nuisance. Thus a man deserts from the military service once for all, but the state of desertion may continue for some time. Alienage itself is a status to which qualifying characteristics may be added which limit the class; as by occurrence of war the alien may become an enemy which status of alien enemy will continue until e. g. peace. So an alien may have the additional status of Chinese laborer, and to this is added, by the act of May 5, 1892 c. 60, the possession of a certificate of residence so that the law now recognizes the status of an alien Chinese laborer without (or with) a certificate of residence. This status continues until it is removed by some legal method as e. g. procurement of a certificate. So long as it continues it is ground for removal, and, if it be in existence at the time of the arrest and de-

portation, it furnishes a present, not a past, basis for the proceedings, and the act which authorizes deportation on account of this continuing status operates necessarily pro and not retroactively. In brief, while an unlawful entry is attempted or accomplished once for all, an unlawful remaining is a continuing state of affairs which may form a legal basis for deportation proceedings at any time it is found to exist.

(*f*) In *Bugajewitz* v. *United States* 228 U. S. 585, the alien was ordered deported because she had been found, after entry, practicing prostitution and an inmate of a house of prostitution in violation of the act of February 20, 1907 c. 1134, as amended by the act of March 26, 1910 c. 128. On the record it had to be taken that she was not a prostitute at the time of her entry (not later than January 4, 1905). It was claimed, therefore, that to apply the act of February 20, 1907 c. 1134, as amended, to her, and to deprive her of the three-year limitation contained in the unamended act was to give the legislation a retroactive effect. This claim the court denied saying:

> With regard to the petitioner it is not necessary to construe the statute as having any retrospective effect.

That is, the unlawful entry (if any) was distinct from the unlawful remaining in the country; the act of February 20, 1907 c. 1134, as amended, applied only to the latter, and, since admittedly the petitioner had been found practicing prostitution subsequent to the act of March 26, 1910 c. 128, the act operated prospectively upon her irrespective

of the time or character of her entry. So in the cases at bar, the charge against the appellants was that they had been unlawfully found in the United States after May 1, 1917, so that no question of the character or time of their entry arose, and to apply the general immigration act of February 5, 1917 c. 29, to them is not to make a retrospective application of that act. *Bugajewitz* v. *United States, supra,* seems to be decisive to this affect.

II.

Assuming that it is not necessary, in order to sustain the deportation proceedings in the cases at bar, to give a retroactive effect to the general immigration act of February 5, 1917 c. 29, the executive procedure prescribed by section 19 of that act, applies to the deportation of Chinese laborers found in this country in violation of the Chinese exclusion laws.

(*a*) Under the general immigration act of February 20, 1907 c. 1134, there had been, prior to the decision of this court on January 28, 1918, in *United States* v. *Woo Jan* 245 U. S. 552, a difference of opinion in the Federal courts as to whether the executive procedure prescribed by section 21 of that act applied to the deportation of Chinese laborers found in this country in violation of the Chinese exclusion laws, certain of the decisions pro and con being noticed by this court in the Woo Jan case (245 U. S. 553); and a comparison of dates shows, of course, that this difference of opinion existed at the time of the passage of the general immigration act of February 5,

1917 c. 29. It was the intention of this latter act to terminate this difference of opinion and to make quite clear the intention of Congress to apply the executive procedure to such cases. The Senate report upon the Act (S. Rept. No. 352, 64th Cong., 1st sess.) contained the following statement as to the purpose of the Act:

> Its object is to make perfectly clear the intent to continue the practice established when the act of 1907 was passed of expelling from the United States every alien who, after having secured admission in one way or another, was found here within the period of limitation fixed and was found to have been at the time of his entry a member of any one of the list of classes enumerated in section 2 of the said act, corresponding to section 3 of this act; *and also the intent to continue the practice established under that act, and since approved in a number of court decisions, * * * of expelling aliens who enter or are found here in violation of the Chinese exclusion law, adapting the administrative process of the immigration act to that class of cases wherever the proceedings are instituted within the period of limitation specified therein.* (Italics ours.)

This object the act effected by, first, providing in section 19 for the arrest and deportation by warrant of the Secretary of Labor of "any alien who * * * shall be found in the United States in violation of this act, *or in violation of any other law of the United States;*" and, second, by providing in section 38

that "this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, *except as provided in section 19 hereof.*" Since section 19 by its inclusion of "violations of any other law of the United States" clearly included violations of the Chinese exclusion laws, and since, by force of the exception in section 38, the Chinese exclusion laws were amended to the extent required by the provision in section 19, it follows necessarily that the executive procedure of deportation prescribed by section 19 applies to Chinese laborers found in this country in violation of the Chinese exclusion laws, and specifically of the act of May 5, 1892, c. 60.

(*b*) The reasoning of this court in *United States* v. *Woo Jan* 245 U. S. 552, where a different construction was given to the immigration act of February 20, 1907 c. 1134, is not applicable to the immigration act of February 5, 1917 c. 29. In the Woo Jan case it was admitted that the provision in section 21 of the act of February 20, 1907 c. 1134, extending the executive procedure to violations of any law of the United States was a strong indication that Congress intended to extend such procedure to violations of the Chinese exclusion laws 245 U. S. 555, but it was held that the unqualified provision of section 43 that the act of February 20, 1907 c. 1134, should not be taken to amend, alter, or repeal the Chinese exclusion laws, being a special, direct provision, overrode the prior general pro-

vision. In the act of February 5, 1917 c. 29, how ever, the language has been changed, and an expre provision made that the Chinese exclusion laws sha be amended in so far as the procedure for deportatio is concerned. In other words, Congress anticipate the decision of this court in the Woo Jan case, an resolved the inconsistency there noted.

There can be no doubt, therefore, that the pro visions of section 19 of the immigration act of Feb ruary 5, 1917 c. 29, apply to the deportation Chinese laborers found in this country in violation the act of May 5, 1892 c. 60.

III.

Assuming that the deportation proceedings were base on acts done by appellants prior to May 1, 1917, vi their entry on July 20, 1915, July 24, 1916, and Apr 28, 1917, respectively, they were nevertheless vali since section 19 of the act of February 5, 1917 (c. 29 operated retroactively to cover acts done prior to it going into effect, provided, at any rate, that the de portation proceedings were begun (as they were i the cases at bar) within 5 years of the original entry

(*a*) What has been said under the two prior head ings is sufficient to show that the deportation pro ceedings in the cases at bar were in accordance wit law. Lest, however, it should be claimed that th Government admits the impossibility of giving a re troactive effect to section 19 of the act of Februar 5, 1917 c. 29, the reasons will be briefly stated whic induce the belief that the decisions of the court below were right, assuming they could be supporte

only on the grounds stated therein. These reasons are three:

First. Section 19, at its very outset, clearly shows its retroactive character. Whereas section 20 of the act of February 20, 1907, c. 1134, provided that "any alien who *shall enter* the United States * * * shall be deported," section 19 of the act of February 5, 1917, c. 29, provided that "any alien who *shall have entered*, or who shall be found, in the United States * * * shall be deported." The Senate report (referred to above) specifically noted this change of language and said of section 19:

> With certain exceptions the provisions of the section are made retroactive.

Second. Section 38 of the act of February 5, 1917, c. 29, provided as follows:

> That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings, brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, *except as mentioned in the third proviso of section nineteen hereof:* * * *

Herein lies the key to the construction of section 19 as to its retroactivity. The language italicized in the excerpt quoted above cannot be given any effect whatsoever unless some portion of the third proviso of section 19 be construed as so to affect some act, thing, or matter done or existing at the time of the taking effect of the act of February 5, 1917, c. 29. In other words, the third proviso of section 19 must be given a

retroactive effect in some way, for some purpose, to some extent, or the exception in section 38 must be stricken from the act.

Third. Section 19 of the act of February 5, 1917, c. 29, begins by specifying in considerable detail the classes of aliens who may be deported on warrant of the Secretary of Labor. The third proviso, to which the exception in section 38 refers, reads:

> That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned *irrespective of the time of their entry into the United States.*

The first question is as to the meaning of the words "time of their entry into the United States." It is evident that this "time of entry" may be taken as relative to the time when the act of February 5, 1917, c. 29, took effect, or as relative to the time when deportation proceedings are instituted. If the words be given the former meaning, the section is given a retroactive effect, if the latter, it is not. We have seen, however, that the exception in section 38 requires a retroactive construction to the third proviso in section 19. Therefore, to carry out the obligation imposed by the exception to section 38, the words "time of entry" in the third proviso to section 19 must be construed as relative to the time when the act of February 5, 1917, c. 29, went into effect, that is, May 1, 1917; and the third proviso must be read as enacting that the deportation provisions of the section apply to the classes of aliens specified in the section,

whether their entry occurred prior to the going into effect of the act or not. This conclusion seems to follow inevitably, if the exception in section 38 be given due effect in connection with the language in the third proviso to section 19.

(*b*) The only remaining question is whether the class of aliens involved in the cases at bar (under the concession made by the Government for the purposes of this part of the argument only), viz, aliens "who shall have entered * * * the United States * * * in violation of any other law of the United States," is among those whose time of entry relative to the time of going into effect of the act is immaterial; or whether it is included in "the exceptions hereinbefore noted" made by the third proviso to section 19 to the general retroactivity of that section. Clearly there is no express exception attached to the class at its place in the section. On the contrary, the words "who *shall have* entered" (as was pointed out above) positively place the class within the enacting portion of the third proviso. Moreover, two classes of aliens are mentioned in section 19 as to whom specific prospective provisions are made, viz, any alien "who is *hereafter* sentenced" for the first time for a crime committed within five years after entry, and any alien "who is *hereafter* sentenced" more than once for a crime committed at any time after entry. Here are two classes where an exception to the retroactive effect of section 19 is "hereinbefore noted," and these classes, therefore, are the classes referred to in the third proviso to section 19 as

excepted from the general provision making
section retroactive. In addition, of course, the
is not retroactive as to that class of aliens ente
or found in violation of the act itself. Apart f
these two express and one implied cases, section
is retroactive as to entry in all cases, including
case of those persons who shall have entered
violation of the Chinese exclusion laws.

The above argument has, of course, no bearing
the meaning of the words at the beginning of sec
19, "at any time within five years after entry."
may be admitted, for the purposes of the cases
bar, that these words qualify the right to insti
deportation proceedings against the class of ali
mentioned second after the beginning of section
(although not directly attached to that class),
aliens who shall have entered this country in vi
tion of the Chinese exclusion laws. The proceedi
against the appellants *were* begun within five ye
after their entry. The point, however, made in
argument above is that the words "time of entry"
the third proviso to section 19 refer to the "time
entry" relative to the time of the going into effect
the act, not the time of instituting deportation p
ceedings, because section 38 of the act of necess
gives them this meaning. The words "time of entr
at the beginning of section 19, however, just as clea
by specific provision relate to the time of institut
the deportation proceedings. The one thing
nothing to do with the other. The third proviso
section 19 must be construed with reference to

exception in section 38, and without reference to the provision contained at the beginning of section 19 as to the institution of deportation proceedings within a certain time after entry, which latter provision must be allowed its own independent operation, after the application of the retroactive provision of the third proviso.

IV.

The appellants were given a fair hearing and there was evidence to sustain the findings of the immigration officials.

Ng Fung Ho, alias Ung Kip, and Ng Yuen Shew were both arrested on warrants issued by the Assistant Secretary of Labor dated September 20, 1917, wherein it is charged that they have been found in the United States in violation of the Chinese exclusion law and setting forth wherein they are subject to deportation. (Ex. C, pp. 27 and 28.)

Both were arraigned under said warrants October 16, 1917, and were permitted to inspect the warrant of arrest and all the evidence on which said warrants were issued, and the aliens notified of their right to be represented by counsel. (Ex. C, pp. 59 and 55.) Said hearings were continued until October 30, 1917, at which time aliens were represented by counsel, who was allowed to inspect the warrants of arrest and all the testimony and evidence forming the immigration record. Counsel was further advised of his right to have witnesses subpœnaed if he so desired, which right was waived. (Ex. C, pp. 58 and 54.) A brief was filed by counsel (Ex. C, p. 67) and the record for-

warded to the department, together with the report of the inspector conducting the hearings under said warrants (Ex. C, pp. 51–46), for the action of the Secretary of Labor.

After a careful review and consideration of the evidence the Assistant Secretary, whose memorandum forms a part of the immigration record (Ex. C, pp. 76–73), ordered the aliens deported and warrants of deportation were issued accordingly (Ex. C, pp. 78 and 79).

The evidence in this case plainly shows that Ng Fung Ho, alias Ung Kip, at the time of his departure for China was not a merchant within the meaning of the Chinese exclusion law, not having been engaged in buying and selling merchandise at a fixed place of business for the space of one year immediately preceding the date of his departure from the United States. On the contrary, the record clearly shows that he was a laborer engaged in the restaurant business in Texas, and had been so for many years prior to his departure for China, and immediately upon his return he again engaged in the same occupation. His reentry into the United States was accomplished by fraud and being a laborer he could not reenter as such, not having a laborer's return certificate required by law. His son, Ng Yuen Shew, whose right to enter depended upon the mercantile status of his alleged father, was also inadmissible and was also admitted by reason of the fraud perpetrated on his behalf by his alleged father.

Gin Sang Get and Gin Sang Mo were arrested on warrants issued by the Assistant Secretary of Labor, dated November 12, 1917, charging that they had been found in the United States in violation of the Chinese exclusion law, and further, that they entered without inspection by means of false and misleading statements. (Ex. A, pp. 2 and 3.)

Both were arraigned and partial hearings had on said warrants November 23, 1917, at which time they were represented by counsel. (Ex. A, pp. 66 and 63.) At the request of counsel the hearings were continued from time to time in an effort to locate the alleged father and obtain his testimony but without success. The hearings were finally concluded January 16, 1918 (Ex. A, pp. 61–53), and the immigration records, together with the inspector's report and findings (Ex. A, pp. 111–109), were forwarded to the department at Washington, D. C., counsel for appellants filing no brief, but submitting the case on the record.

The Assistant Secretary of Labor, after a careful review and consideration of all the evidence as appears from his memorandum, ordered the aliens' deportation (Ex. A, pp. 116–114), and warrants of deportation were issued accordingly (Ex. A, pp. 118 and 119).

It thus appears that the appellants were accorded every opportunity of presenting any and all evidence in support of their right to be and remain in the United States; that they were represented by counsel, and that none of the rights to which they were en-

titled under the law or the rules and regulations of the Department of Labor was denied them. The evidence against them seems to have received the careful scrutiny of the Court of Appeals (R. 56–60), which decided that it was sufficient under the rule applicable to such proceedings.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

JAMES M. BECK,
Solicitor General.
WILLIAM C. HERRON,
Attorney.

○

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JAMES D. MAHER,
CLERK

No. [redacted]176

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; GIN SANG GET and GIN SANG MO (on Habeas Corpus),
Petitioners,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit,
and
BRIEF IN SUPPORT,
together with
MOTION AND NOTICE, AND APPEARANCE.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Evans Building, Washington, D. C.,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Bank of Italy Building, San Francisco, Cal.,
Of Counsel.

No.

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to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT,
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MOTION AND NOTICE, AND APPEARANCE.

To the Honorable Edward Douglas White, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ng Fung Ho, otherwise known as Ung Kip; Ng Yuen Shew; Gin Sang Get and Gin Sang Mo, through their attorneys and counsel pray the court to issue a writ of certiorari to bring up the above-entitled cause, as it affects your petitioners, for review.

Statement and Brief in support thereof.

The petitioners are four persons of Chinese extraction and of the Chinese race, the first two of whom are admittedly aliens, the latter two are the foreign born sons of a native born citizen, and under the terms of Sec. 1993 of the Revised Statutes, are themselves citizens of the United States. Each of the four petitioners were admitted into the United States after due and proper examination and determination of their right of admission by the proper Immigration Officials of the United States through the Port of San Francisco, where they had each arrived prior to May 5, 1917, which was the date upon which the General Immigration Act of February 5, 1917, became effective. Ng Fung Ho, otherwise known as Ung Kip, was readmitted as a merchant returning to an unrelinquished commercial domicile which had been preinvestigated and determined favorably to him before

his departure from the United States; Ng Yuen Shew was admitted into the United States upon appeal by the Secretary of Labor as the minor son of the said Ng Fung Ho; Gin Sang Get and Gin Sang Mo, brothers, were admitted by the Port Immigration Officials as citizens as above set forth. After their entry into this country and their mixing with and becoming part and parcel of our population, they were arrested under the *executive warrant of deportation proceedings* provided for in Sec. 19 of the General Immigration Act of February 5, 1917, notwithstanding that they had arrived in the United States prior to May 1, 1917, the date said Act became effective, and this, in spite of the fact that Sec. 38 of said Act holds in force unamended and unaltered, all prior laws for the subsequent prosecution of all acts, things and matters in existence at the time of the taking effect of the Act in question. The charge made was for a violation of the Chinese Exclusion Acts, rather than of the General Immigration Law whose executive deportation procedure was invoked. The Chinese Exclusion Acts *provide exclusively for a judicial deportation proceeding* as lately upheld by this court in the case of *U. S. v. Woo Jan*, 245 U. S. 552; 38 Sup. Ct. 207; where an executive warrant of the Secretary of Labor under the authority claimed to be vested in him under the Immigration Act, was held to be void.

Petitioners claim that if the question of the legality of their residence in the United States

under the Chinese Exclusion Acts is to be now drawn in question (their arrival having antedated the taking effect of the General Immigration Act of February 5, 1917), that this may only be done in a judicial deportation proceeding as exclusively provided for in the Chinese Exclusion Acts, and as upheld by this court in the *Woo Jan case*, supra. This, for the reason that the concluding section of the General Immigration Act 38, provides that it shall not alter the existing Chinese Exclusion Acts, save as to Sec. 19 which provides for the executive deportation process, and by its concluding proviso holds in force all prior laws unamended and unaltered for the prosecution of all prior acts, things and matters. Common cause was made before the lower court by your petitioners for the reason that this, the predominant point, was one common to them all. The exact point as here presented lately engrossed the attention of the Circuit Court of Appeals for the Fifth Circuit in the case of *Mayo, etc. v. U. S.*, 251 Fed. 275, and *the court there upheld the contention which these petitioners urged unavailingly before the lower court.* It is to be noted that the *Woo Jan case*, supra, was decided by this court on January 28, 1918, almost one year after the passage on February 5, 1917, of the present General Immigration Law, hence this present General Immigration Act was most certainly within the general knowledge and observation of this court and was quite likely in mind, when, in the concluding paragraph of the opinion in the *Woo Jan case*, supra, it is set forth in part as follows:

> "This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act. * * * The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion Laws are adapted to them and their procedure is hence saved by section 43".

A further and more recently decided case, that of *White v. Chin Fong,* U. S. ; 40 Sup. Ct. 449; decided on May 17, 1920, more than three years after the present General Immigration Law became effective, tends to confirm this view. It is there held as follows:

> "In the case of United States v. Woo Jan, 245 U. S. 552, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who had been in the United States and has departed from it with the intention of returning is entitled under existing legislation to have his right to do so judicially investigated with 'its assurances and sanctions', as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action."

As affecting the present litigation we are confronted with the fact that Ng Fung Ho, a returning merchant with an investigated status as a merchant, would be entitled to a judicial determination of his right to re-enter, had that right been withheld.

Can it by any parity of reasoning be held that his rights are any less because of his regular entry upon the order of the commissioner? Can he be deported by a less formal proceeding than he is entitled to in asserting his right of entry? We think not. Ng Yuen Shew was landed upon appeal by the secretary as his son. As to Gin Sang Get and Gin Sang Mo, they are citizens, but their rights as such cannot be less than that of the alien merchant as has been held by this court in *Tsoi Sim v. U. S.*, 116 Fed. 920, 925 (9th Circuit).

The paramount rights of American citizenship for a full and fair opportunity to be heard before the judicial branch of the Government should not be denied one who has been arrested here in our midst in the full and complete enjoyment thereof.

Gee Cue Bing v. U. S., 184 Fed. 383; 106 C. C. A. 493 (5th Circuit);

Moy Suey v. U. S., 147 Fed. 697; 78 C. C. A. 85 (7th Circuit).

See, also,

U. S. v. Jhu Why, 175 Fed. 630;

Pang Sho Yin v. U. S., 154 Fed. 660; 83 C. C. A. 484 (6th Circuit);

U. S. v. Charlie Dart, 251 Fed. 394.

The proposition of determining the question of American citizenship of one arrested here in our midst without a judicial hearing seems to us preposterous. The petitioners may be obscure personages of the Chinese race, but the rights of American citizenship are sacred and entitled to the full

protection of the law as was lately and on June 7, 1920, declared by this court in the case of *Kwock Jan Fat v. White,* U. S. ; 40 Sup. Ct. 566, where it is held:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

The difference between the executive hearing accorded by the Secretary of Labor, with its limited right of counsel and star chamber methods, and a judicial hearing was most clearly and convincingly set forth in the *Woo Jan case,* supra, by this court as follows:

> "The difference is marked. It is the difference between administrative and judicial action; and the government recognized that the difference—we might say contrast—is the step on which it 'must fall down, or else o'leap'. And necessarily so. Manifestly the remedy of section 21 has not the safeguards of impartiality and providence that the remedy of the Exclusion Laws has. Mere discretion prompts the first and last act of the former; the latter has the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions."

If a citizen of the United States, residing in peace in his own country as part and parcel of its citizenship and population, may be taken into custody by an *administrative action* where *mere discretion prompts the first and last act* and deprived of his right of residence in the country of his citizenship and be subjected to nothing short of banishment,

then indeed is the priceless heritage of American citizenship most perilously exposed. In the celebrated case of General Castro, the former President of Venezuela, which arose when he was refused admission to the United States by the Immigration authorities, and which caused the eyes of the world to be centered on our judiciary, which is reported as *U. S. v. Williams,* 203 Fed. 155, it is held:

> "Aliens have the right to enter the United States except so far as the right is restricted by our statutes. * * * The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected".

What are *"the constitutional guaranties of citizens"* here adverted to if one found in the possession and enjoyment of citizenship here in our midst as part and parcel of our citizenship and population, may be taken and deprived of these priceless blessings in a purely *administrative action* where *mere discretion prompts the first and last act?* We cannot resign ourselves to any other conclusion than that they are entitled to a hearing in a *judicial action* which alone *has the security of procedure and ultimate judgment of a judicial tribunal where all action which precedes judgment is upon oath and has its assurance and sanctions.*

This cause is submitted to this court for its decision upon the great and far reaching questions here

involved and presented. It presents also a difference in judicial decision between the courts of appeal of the Fifth and Ninth Circuit, upon a question which is of great and vast importance to many citizens of this country, though of the Chinese race, and many alien Chinese who live here within the protection of our treaty with their country and ours, and as a result of which laws were past which assured to them a judicial hearing of their right of residence should that question ever be urged against them.

Dated, Washington, D. C.,
December 1, 1920.

Respectfully submitted,

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for a writ of certiorari is, in judgment of counsel, well founded and is not interposed for delay.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

MOTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Now comes Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Gin Sang Get and Gin Sang Mo, by their attorneys in their behalf, and moves this Honorable Court that it shall by certiorari or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said court to certify to this court, for its review and determination, insofar as it affects your petitioners, a certain cause in said Court of Appeals lately pending, wherein your petitioners were of the parties appellant, the complete title of the cause being, Ng Fung Ho, otherwise known as Ung Kip; Ng Yuen Shew; Lui Yee Lau, otherwise referred to as Louie Pon; Gin Sang Get and Gin Sang Mo, Appellants, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. That this motion may be granted your petitioners respectfully offer herewith their petition and brief in support thereof, also a certified copy of transcript of record of all proceedings in the United States Circuit Court of Appeals for the Ninth Circuit. All original documents are offered with the required number of copies.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

NOTICE OF MOTION.

To the Respondent in the above entitled matter, and to A. Mitchell Palmer, Attorney General of the United States:

Please take notice that on Monday, the 6th day of December, 1920, at the opening of the court on that day, or as soon thereafter as counsel may be heard, Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Gin Sang Get and Gin Sang Mo, petitioners herein, will upon their petition and copies of the entire record of this action, submit a motion, a copy of which and of the petition for a writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, District of Columbia.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

APPEARANCE.

To the Clerk of the United States Supreme Court:

Please enter the undersigned as attorneys of record for the petitioners in the above-entitled matter.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

Reversed.

NG FUNG HO, OTHERWISE KNOWN AS UNG KIP, ET AL. *v.* WHITE, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 176. Argued March 17, 20, 1922.—Decided May 29, 1922.

1. Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings. P. 280.
2. The Chinese Exclusion Act of May 5, 1892, as amended, makes it unlawful for a Chinese laborer not in possession of a certificate of residence to remain in the United States, irrespective of the legality of his entry. P. 281.

3. A Chinese person thus unlawfully in the United States is subject to executive deportation under the General Immigration Act of February 5, 1917, § 19, without giving it a retroactive effect, although he entered the country before it was passed, because the act applies to any alien who "shall be found" here in violation of any federal law, as well as those who shall have entered unlawfully. P. 280.

4. Persons of Chinese blood who have been admitted into the country by the immigration authorities and afterwards arrested and held for deportation, who claim to be citizens of the United States in virtue of the citizenship of their father (Rev. Stats. § 1993,) and who support the claim by evidence both before the immigration officers and upon petition for habeas corpus, are entitled, under the Fifth Amendment, to a judicial hearing of the claim, in the habeas corpus proceeding. P. 282.

266 Fed. 765, affirmed in part and reversed in part.

The petitioners, Chinese held for deportation under warrants issued by the Secretary of Labor pursuant to the Immigration Act of 1917, obtained from the District Court a writ of habeas corpus. That court subsequently ordered the writ quashed and the petitioners remanded to custody. The present review is directed to a judgment of the Circuit Court of Appeals, affirming the action of the District Court as to all of the petitioners except one whom it ordered released.

Mr. Jackson H. Ralston, with whom *Mr. George W. Hott* and *Mr. Geo. A. McGowan* were on the brief, for petitioners.

Mr. William C. Herron, with whom *Mr. Solicitor General Beck* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On January 27, 1919, five persons of the Chinese race, of whom four are petitioners herein, joined in an application for a writ of habeas corpus to the judge of the federal court for the Southern Division of the Northern District

of California. A writ issued directed to the Commissioner of Immigration for the Port of San Francisco, who held the petitioners in custody under warrants of deportation of the Secretary of Labor pursuant to § 19 of the General Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889. The case was heard upon the original files of the Bureau of Immigration containing the record of the deportation proceedings. Each petitioner had entered the United States before May 1, 1917, the effective date of the General Immigration Act of February 5, 1917, and within five years of the commencement of the deportation proceedings. As to each the warrant of deportation recited that the petitioner was a native of China, was found to have secured his admission by fraud, and was found within the United States in violation of § 6 of the Chinese Exclusion Act of May 5, 1892, c. 60, 27 Stat. 25, as amended by the Act of November 3, 1893, c. 14, 28 Stat. 7, being a Chinese laborer not in possession of a certificate of residence. The District Court entered an order quashing the writ and remanding the prisoners to the custody of the immigration authorities. The judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, except as to one appellant who was ordered released, 266 Fed. 765. The case is here on writ of certiorari, 254 U. S. 628.

There is a faint contention, which we deem unfounded, that the petitioners were not given a fair hearing and that there is no evidence to sustain the findings of the immigration official. The contention mainly urged is that any violation of the Chinese Exclusion Laws [1] of which peti-

[1] See Act of May 6, 1882, c. 126, 22 Stat. 58, as amended by the Act of July 5, 1884, c. 220, 23 Stat. 115; Act of September 13, 1888, c. 1015, § 13, 25 Stat. 476, 479; Act of October 1, 1888, c. 1064, 25 Stat. 504; Act of May 5, 1892, c. 60, §§ 2, 3, 6, 27 Stat. 25; Act of November 3, 1893, c. 14, § 1, 28 Stat. 7; Act of March 3, 1901, c. 845, 31 Stat. 1093; Act of April 29, 1902, c. 641, 32 Stat. 176; Act of April 27, 1904, c. 1630, § 5, 33 Stat. 394, 428.

tioners may be guilty occurred prior to the effective date of the General Immigration Act of February 5, 1917; that, consequently, petitioners were not subject to its provision authorizing deportation on executive orders; and that under the provisions of the Chinese Exclusion Acts they could be deported only upon judicial proceedings. In certain respects the situation of two of the petitioners differs from that of the other two; and, to that extent, their rights require separate consideration.

First. As to Ng Fung Ho and Ng Yuen Shew, his minor son, the question presented is solely one of statutory construction. Deportation under provisions of the Chinese Exclusion Acts can be had only upon judicial proceedings; that is, upon a warrant issued by a justice, judge or commissioner of a United States court upon a complaint and returnable before such court, or a justice, judge or commissioner thereof. From an order of deportation entered by a Commissioner an appeal is provided to the District Court and from there to the Circuit Court of Appeals. *United States, Petitioner,* 194 U. S. 194. We held in *United States* v. *Woo Jan,* 245 U. S. 552, that § 21 of the General Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, which authorized deportation of aliens on executive orders, did not apply to violators of the Chinese Exclusion Acts and that they continued to enjoy the right to a judicial hearing. The 1907 Act remained in force until May 1, 1917, when the General Immigration Act of February 5, 1917, became operative. Section 19 of the latter act also provides for deportation of aliens on executive orders. The question is: Did the Act of 1917 also preserve to Chinese the exceptional right to a judicial hearing as distinguished from an executive hearing?

Petitioners practically concede that Chinese who first entered the United States after April 30, 1917, are subject to deportation under the provisions of § 19; but they insist that the rights and liabilities of those who entered before

May 1, 1917, are governed wholly by the Chinese Exclusion Acts; and that these remain entitled to a judicial hearing. The mere fact that at the time petitioners last entered the United States they could not have been deported except by judicial proceedings presents no constitutional obstacle to their expulsion by executive order now. Neither Ng Fung Ho nor Ng Yuen Shew claims to be a citizen of the United States. Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings. *Bugajewitz* v. *Adams*, 228 U. S. 585; *Lapina* v. *Williams*, 232 U. S. 78; *Lewis* v. *Frick*, 233 U. S. 291. Our task, therefore, so far as concerns these two petitioners, is merely to ascertain the intention of Congress.

Petitioners argue that to hold § 19 of the 1917 Act applicable to them would give it retroactive operation contrary to the expressed intention of Congress. They rely particularly on the clauses in § 38 which declare that "as to all . . . acts, things, or matters," "done or existing at the time of the taking effect of this [1917] Act" the "laws . . . amended . . . are hereby continued in force." [1] The Government, on the other hand, insists that

[1] Section 19 provides for taking into custody upon warrant of the Secretary of Labor, and deportation, of "any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States."

The third proviso of § 19 reads:

"That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States."

Section 38 specifically repeals the existing law upon the taking effect of the act and continues:

"*Provided*, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons . . . except as provided in section nineteen hereof: . . . *Provided further*, That nothing contained in this Act

§ 19 was intended to operate retroactively and to cover acts done prior to its going into effect, provided deportation proceedings were begun within five years after entry. But its main contention rests upon the fact that here the arrest and deportation are based, not merely upon unlawful entry, but upon the unlawful remaining of the petitioners after May 1, 1917. For the charge as to each is, " that he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the Act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence."

Unlawful remaining of an alien in the United States is an offense distinct in its nature from unlawful entry into the United States. One who has entered lawfully may remain unlawfully. This is expressly recognized in § 6 of the Act of May 5, 1892, under which the deportations here in question were sought. See *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Li Sing* v. *United States,* 180 U. S. 486; *Ah How* v. *United States,* 193 U. S. 65. A different rule might apply if the statute had so connected the two offenses that there could not be an unlawful remaining unless there had been an unlawful entry. Compare § 1 of the Act of May 6, 1882, c. 126, 22 Stat. 58. As we agree with the Government that the orders of deportation were valid because these petitioners were then unlawfully within the United States, we have no occasion to consider its further contention that Congress intended § 19 to be broadly retroactive.

Second. As to Gin Sang Get and Gin Sang Mo a constitutional question also is presented. Each claims to be

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shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this Act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this Act are hereby continued in force and effect."

a foreign-born son of a native-born citizen; and, hence, under § 1993 of the Revised Statutes, to be himself a citizen of the United States. They insist that, since they claim to be citizens, Congress was without power to authorize their deportation by executive order. If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. *United States* v. *Ju Toy*, 198 U. S. 253; *Tang Tun* v. *Edsell*, 223 U. S. 673. But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surreptitiously. See *United States* v. *Wong You*, 223 U. S. 67. They arrived at San Francisco, a regularly designated port of entry; were duly taken to the immigration station; and, after a protracted personal examination, supplemented by the hearing of witnesses and the examination of reports of immigration officials, were ordered admitted as citizens. Then they applied for and received their certificates of identity. Fifteen months after the entry of one and six months after the entry of the other, both were arrested, on the warrant of the Secretary of Labor, in Arizona where they were then living. The constitutional question presented as to them is: May a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void *ab initio*. *United States* v. *Sing Tuck*, 194 U. S. 161. But these petitioners did not merely assert a claim of citizenship. They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. The precise question is: Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of this claim?

The question suggests—but is different from—another concerning deportation proceedings on which there is much difference of opinion in the lower courts, namely: Whether the provision which puts upon the detained the burden of establishing his right to remain (see § 3 of the Act of May 5, 1892; *Chin Bak Kan* v. *United States,* 186 U. S. 193; *Ah How* v. *United States,* 193 U. S. 65) applies where one resident within the country is arrested under the provisions of the Chinese Exclusion Law, and claims American citizenship.[1] There the proceeding for deportation is judicial in its nature. It is commenced usually before a commissioner of the court; but on appeal to the District Court additional evidence may be introduced and the trial is *de novo*. *Liu Hop Fong* v. *United States,* 209 U. S. 453. The constitutional question presented in those cases is merely how far the legislature may go in prescribing rules of evidence and burden of proof in judicial pro-

[1] In *Moy Suey* v. *United States,* 147 Fed. 697, where a Chinaman who claimed to have been born in the United States was ordered deported by the commissioner because he found that the prisoner had not "satisfactorily established, by affirmative proof, his lawful right to be and remain in the United States," the order of deportation was reversed by the Circuit Court of Appeals for the Seventh Circuit, because one within the country claiming to be a citizen "may not be deported or banished until the right of the government to deport or banish has been judicially determined." This decision was followed in *Gee Cue Beng* v. *United States,* 184 Fed. 383 (C. C. A., Fifth Circuit); *Fong Gum Tong* v. *United States,* 192 Fed. 320; *United States* v. *Charlie Dart,* 251 Fed. 394. Compare *United States* v. *Jhu Why,* 175 Fed. 630. In the following cases it was held that the burden of establishing American citizenship rested upon the Chinaman: *Yee King* v. *United States,* 179 Fed. 368; *Kum Sue* v. *United States,* 179 Fed. 370; *United States* v. *Too Toy,* 185 Fed. 838; *Yee Ging* v. *United States,* 190 Fed. 270; *Bak Kun* v. *United States,* 195 Fed. 53; *United States* v. *Hom Lim,* 223 Fed. 520; *Fong Ping Ngar* v. *United States,* 223 Fed. 523; *Ng You Nuey* v. *United States,* 224 Fed. 340; *Chin Ah Yoke* v. *White,* 244 Fed. 940; *Sit Sing Kum,* 277 Fed. 191.

ceedings. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729. *Bailey* v. *Alabama*, 219 U. S. 219, 238; *Luria* v. *United States*, 231 U. S. 9, 26; *Hawes* v. *Georgia*, 258 U. S. 1. Here the proceeding is throughout executive in its nature.

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. *Ex parte Reed*, 100 U. S. 13; *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109. Compare *Ex parte Crow Dog*, 109 U. S. 556. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth. For where there is jurisdiction a finding of fact by the executive department is conclusive, *United States* v. *Ju Toy*, 198 U. S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow* v. *United States*, 208 U. S. 8, or the finding was not supported by evidence, *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, or there was an application of an erroneous rule of law, *Gegiow* v. *Uhl*, 239 U. S. 3. To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in *Chin Yow* v. *United States*, 208 U. S. 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth

Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States* v. *Woo Jan*, 245 U. S. 552, 556; *White* v. *Chin Fong*, 253 U. S. 90, 93.

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States; but it does not follow that they should be discharged. The practice indicated in *Chin Yow* v. *United States, supra,* and approved in *Kwock Jan Fat* v. *White*, 253 U. S. 454, 465, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that court of the question of citizenship and for further proceedings in conformity with this opinion. As to Ng Fung Ho and Ng Yuen Shew the judgment of the Circuit Court of Appeals is affirmed.

Judgment affirmed in part and reversed in part.

Writ of habeas corpus to issue as to Gin Sang Get and Ging Sang Mo.